Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Petitioner,

v.

BURLINGTON NORTHERN and
SANTA FE RAILWAY COMPANY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

WILLIAM A. BON
General Counsel
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
26555 Evergreen Road, Suite 200
Southfield, MI 48076
(248) 948-1010

SANFORD R. DENISON
BAAB & DENISON, L.L.P.
2777 N Stemmons Freeway
Suite 1100
Dallas, TX 75207-2228
(214) 637-0750

RICHARD S. EDELMAN *
O'DONNELL, SCHWARTZ, ANDERSON, P.C.
1900 L Street, N.W.
Suite 707
Washington, D.C. 20036
(202) 898-1824

* Counsel of Record

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QUESTION PRESENTED

Whether Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First) can be a basis for an injunction that requires a union to give rail carriers ten days advance notice of any strike, when the language of Section 2 First imposes no advance notice requirement, this Court's decisions under Section 2 First have rejected expansive readings of that provision and narrowly limited the scope of enforceable obligations of labor and management under that provision and such application of Section 2 First will necessarily open up a broad range of union and carrier activity to regulation by the courts, in a manner contrary to the design of the RLA and this Court's precedent concerning the role of the courts under the RLA?

LIST OF PARTIES

Petitioner:

Brotherhood of Maintenance of Way Employees

Respondents:

Burlington Northern & Santa Fe Railway Co.

Consolidated Rail Corp.

CSX Transportation, Inc.

Kansas City Southern Railway Co.

Norfolk Southern Railway Co.

Union Pacific Railroad Co.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Court, petitioner states that it is a labor union and thus has no parent companies or non-wholly owned subsidiaries.

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
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v.

BURLINGTON NORTHERN and
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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Brotherhood of Maintenance of Way Employes ("BMWE"), respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in *Burlington Northern And Santa Fe Railway Company, et al. v. Brotherhood of Maintenance of Way Employes*, 286 F. 3d 803 (5th Cir. 2002), which was entered on April 4, 2002. BMWE filed a petition for rehearing en banc that was denied on August 30, 2002.

OPINIONS BELOW

The panel opinion of the Court of Appeals for the Fifth Circuit is reported at 286 F. 3d 803, and it is reproduced as Appendix B to this Petition at 3a-22a. The decision of the United States District Court for the Northern District of

Texas, that was affirmed by the Fifth Circuit is reported at 143 F. Supp. 2d 672, and it is reproduced as Appendix C at 23a-66a. The Order of the Court of Appeals denying panel rehearing and rehearing en banc is not reported; it is reproduced as Appendix A at 1a-2a.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was entered on April 4, 2002. Petitioner filed a timely petition for rehearing en banc. The Fifth Circuit entered its decision denying the petition on August 30, 2002. This Petition is timely under 28 U.S.C. § 101 (c) and Rule 13 of the Rules of the Court since it is being filed within ninety days of issuance of the order of the Court of Appeals denying rehearing and rehearing en banc. Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

At issue in this case is the proper interpretation, scope and application of Section 2 First of the Railway Labor Act ("RLA"), 45 U.S.C. § 152 First. Section 2 First provides as follows:

> It shall be the duty of all carriers, their officers agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

STATEMENT OF THE CASE

This case concerns an unprecedented effort by all of the Nation's large rail carriers ("Carriers") to require that BMWE provide them with at least ten (10) days advance notice of any

strike, even though there is no such requirement in Section 2 First, or any other part of the RLA. A divided panel of the Court of Appeals upheld the District Court's conclusion that BMWE could be ordered to give advance notice of strikes under RLA Section 2 First because BMWE had struck in response to carrier actions in past disputes without giving advance notice to the carriers involved. The Court of Appeals therefore affirmed the District Court's order that permanently enjoined BMWE from any strikes against the Carriers unless it gives the requisite advance notice of its plans.

In their complaint in the District Court, the Carriers asserted that BMWE had a policy or practice of striking in disputes over collective bargaining agreement provisions that are required to be arbitrated under Section 3 of the RLA (45 U.S.C. §153), and that BMWE had a policy and practice of doing so without providing advance notice to the carriers involved. District Court, App. C. at 24a-25a; 32a-33a. The complaint described decisions in other previously litigated cases over an eight year time span in which BMWE struck in response to carrier actions that BMWE viewed as involving unilateral changes in agreements, and thus as "major disputes" under Section 2 Seventh of the RLA (45 U.S.C. § 152 Seventh). The District Court observed that the strikes in those cases were temporarily and/or preliminarily enjoined by the other courts, and that a number of the disputes were subsequently found to be "minor disputes", over which strikes are unlawful because such disputes must be arbitrated under RLA Section 3. App. C at 33a-44a. Although BMWE presented evidence countering the Carriers' description of the various prior disputes, and their description of the decisions in those cases, the District Court granted summary judgment to the Carriers.[1]

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[1] As the dissenting judge on the Court of Appeals noted, BMWE demonstrated that there were strikes or attempted strikes in only twelve of the eighteen cases cited by the Carriers and the District Court; the other

The District Court found that "BMWE has a pattern, practice and policy" of exercising self-help "over what BMWE claims are unilateral changes in agreements" and "that those activities have occurred in the case of minor disputes and before major dispute procedures if they applied, would be exhausted". App. C at 61a-62a. The District Court held that, in either situation, any strike without advance notice would violate Section 2 First. The District Court concluded that its Order would "serve the goal of the RLA 'to avoid any interruption of commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.'" App. C at 61a-64a.

The Fifth Circuit affirmed the District Court's decision. The panel majority held that the decision was supported by the language of Section 2 First, and that the injunction was consistent with the D.C. Circuit's decision in *Delaware & Hudson Ry. Co. v. UTU*, 450 F. 2d 603 (D.C. Cir. 1971), and the 11th Circuit's decision in *Delta Air Lines, Inc. v. Air Line Pilots Ass'n.*, 238 F.3d 1300 (11th Cir. 2001). App. B. at 6a-9a.

The majority rejected BMWE's assertion that the plain language of Section 2 First does not require advance notice of a strike; in so holding, the majority cited the provision's "mandate that labor and management 'exert every reasonable effort . . . to settle all disputes . . . in order to avoid any interruption to commerce". App. B at 6a-7a, ellipses in

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cases involved instances where BMWE would not rule out a strike. 5th Cir dissent App. B at 16a n.3. BMWE also demonstrated that, in three of the twelve actual strike or attempted strike cases, the carriers involved voluntarily ceased the actions that gave rise to the strikes; and in two of the cases BMWE prevailed in the District Court but lost on appeal. 5th Cir dissent App. B. at 21a and n.s 4 and 5. BMWE also presented evidence that, in another two of the cases, the anti-strike injunctions were conditioned upon cessation of, or limitations on, the disputed carrier actions.

original. But the panel majority specifically stated that "[w]e need not, and do not address the question whether the RLA forbids *all* surprise strikes". App. B. at 9a, emphasis in original. The majority viewed the history of BMWE strikes without advance notice as sufficient to support issuance of an injunction under Section 2 First.

The Court below also rejected BMWE's argument that the District Court's broad reading of Section 2 First would subject a whole range of currently lawful union and carrier actions to regulation under Section 2 First. The Court said that:

> § 152 First applies only to actions that cause "interruption of commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof". 45 U.S.C. § 152 First. The actions posited by BMWE, while they may make dispute resolution more difficult, do not, in and of themselves, interrupt commerce, while surprise strikes undeniably do. And strike prevention, not dispute resolution *per se*, was "the major purpose of the Railway Labor Act".

App. B at 9a-10a, citation omitted.

The majority did not address BMWE's argument that the District Court's application of Section 2 First conflicts with decisions of this Court regarding Section 2 First, such as *Chicago & North Western Transp. Co. v. United Transportation Union*, 402 U.S. 570 (1971) ("*CNW v. UTU*"); *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employes*, 481 U.S. 429 (1987) ("*BN v. BMWE*"); and *Virginian Ry. Co. v. System Federation No. 40, RED*, 300 U.S. 515 (1937). Nor did the majority address BMWE's argument that the District Court's decision was contrary to decisions of this Court regarding the limited role of the Courts under the RLA, such as *Texas & New Orleans R.R. Co. v. B'hood of Ry. & Steamship Clerks*, 281 U.S. 548 (1930); *General Committee of Adjustment of the Brother-*

hood of Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co., 320 U.S. 323 (1943); and *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 441 (1989). The majority also rejected BMWE's arguments that *Delaware & Hudson Ry. Co. v. UTU* and *Delta Airlines v. Air Line Pilots Ass'n.* were clearly inapposite. App. B. at 7a n.4 and 8a-9a; *see also* dissent at 18a-19a.

The dissenting Judge concluded that the language of the statute did not support the majority's holding that strikes without advance notice violate Section 2 First, and that the majority had effectively amended the statute by judicial action, applying policy preferences rather than the law as written by Congress. App. B. at 15a, 17a-18a. The dissenting judge also agreed with BMWE that *Delta Airlines v. Air Line Pilots Ass'n.* and *Delaware & Hudson Ry. Co. v. UTU* are distinguishable from this case and that the language from *Delaware & Hudson Ry. Co. v. UTU* that was relied on by the majority was indeed dicta. App. B. at 18a-19a.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that this Court should review the decision below because the Fifth Circuit has created a duty that does not exist under the RLA, applied Section 2 First in a way that conflicts with decisions of this Court that have rejected broad readings of Section 2 First and limited the scope of application of that provision, and made a radical change in the rights and obligations of labor and management in two important industries.

Section 2 First contains no prohibition against strikes. And, unlike Section 6 of the RLA, which contains a formal notice requirement and expressly describes detailed procedures that must be followed before the use of self help, there is no language in Section 2 First that requires that a party give advance notice, or follow any other procedure, before engaging in self help. In fact, the Fifth Circuit's decision did

not cite any notice requirement in Section 2 First; instead, it relied on the general mandate that parties should exercise every reasonable effort to settle disputes, and the stated goal of avoiding interruption of commerce, as creating a duty to give advance notice.

Not only is the Court of Appeals' decision without a basis in the statute, but it also directly conflicts with decisions of this Court that have rejected broad readings of Section 2 First and carefully circumscribed the scope of application of that provision. Indeed, this Court has relatively recently rejected the Carriers' effort to read another statutory prohibition into the general language of Section 2 First and its goal of avoiding disruptions of commerce. *BN v. BMWE*, 491 U.S. at 450-452. The decision below is also contrary to this Court's repeated holding that the courts have a limited role under the RLA; a holding that was based on recognition that the RLA was the product of prolonged negotiations between rail labor and rail management, was enacted as presented to Congress with a design to foster voluntary resolution of disputes with few mandatory requirements, and envisioned a minimal role for administrative and judicial compulsion. The Court of Appeals' decision is thus contrary to the language of the statute and its structure and history, as well as decisions of this Court regarding the limited scope of Section 2 First.

Moreover, the Court of Appeals established a dramatic new role for the courts in the administration of the Act that the courts were not given by Congress. The Fifth Circuit's interpretation of Section 2 First opens up a whole new range of conduct of labor and management to judicial oversight and injunctive orders. While the Court of Appeals asserted that its decision was limited to these facts and this union (Decision at 4), there is no principled way to limit that Court's expansive reading of Section 2 First to the particular actions of this one Union. If the Fifth Circuit's decision is allowed to stand, it will mean a significant expansion of the scope of Section 2

First, and a significant expansion of the role of the courts in the enforcement of the RLA. This unprecedented expansion comes 76 years after enactment of the RLA and many years after various Congressional amendments to the statute. If the Court does not reverse the Fifth Circuit's decision, both carriers and unions will increasingly resort to the courts to resolve disputes that the RLA reserved to the parties, not an administrative agency or the courts.

The decision below is reminiscent of the day when the courts issued injunctions in labor disputes based on their own notions of what was reasonable behavior and good labor policy, an approach to labor law that was rejected by the RLA and repudiated by the NLGA. *CNW v. UTU*, 402 U.S. at 583; *BN v. BMWE*, 481 U.S. at 437-438, 443, 451 n.15, Accordingly, the Court should grant the writ to reverse a decision that conflicts with decisions of this Court and to prevent a judicial re-making of the basic design of the Railway Labor Act.

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH PRECEDENT OF THIS COURT REGARDING THE SCOPE OF SECTION 2 FIRST

In *BN v. BMWE*, this Court firmly rejected an expansive reading of Section 2 First offered by the Carriers when they asserted that secondary picketing violated Section 2 First. The Carriers argued that secondary picketing is contrary to "general language of § 2 First" (491 U.S. at 450), the same general language they relied on in this case in arguing that BMWE violated the RLA by striking without advance notice. In particular, the Carriers argued in *BN v. BMWE* that "the duty [Section 2 First] places on employees to attempt to settle disputes and thereby avoid any interruption to interstate commerce", together with what they described as the RLA purpose of "prevent[ing], if possible wasteful strikes and

interruptions of interstate commerce", should be read to prohibit secondary picketing. *Id.* at 450. However, the Court rejected their attempt to broaden the reach of Section 2 First, noting that the position urged by the Carriers was inconsistent with earlier decisions of the Court that had inferred enforceable RLA obligations only when there were specific RLA commands. *Id.* at 451-452.

The *BN v. BMWE* Court stated that its holding in *Brotherhood of RR. Trainmen v. Chicago River & Indiana RR.* 353 U.S. 30 (1957), that unions may be enjoined from striking over minor disputes, was based on "the express language of § 3 First, which unambiguously compelled arbitration of minor disputes, the only inference drawn was that a strike was incompatible with this explicit obligation". 481 U.S. at 452 n. 15. The *BN v. BMWE* Court said that in the case then before it, no "'basic command' of the RLA" could be said to have been violated by the secondary picketing; and that it was being asked not only to infer that a statutory duty was enforceable by injunction, "*but also that such a duty exists*". *Id.*, emphasis added. In rejecting the Carriers' attempt to broaden the reach of Section 2 First, the Court also distinguished *BN v. BMWE* from its one prior decision that found an enforceable obligation under Section 2 First: *CNW v. UTU*. The *BN v. BMWE* Court noted that the *CNW v. UTU* Court had found that because the "express language of Section 2 First creates a duty to 'exert every reasonable effort' to settle disputes", parties have an obligation to bargain in good faith. But the *BN v. BMWE* Court observed that the *CNW v. UTU* Court found that the duty to bargain in good faith was actually expressed in the statute, and that the only inference it drew was that the duty was legally enforceable. The Court then stated that "[t]he language of § 2

First does not contain, however, either an express proscription of secondary activity or a suggestion that the scope of self help is limited". 491 U.S. at 452 n. 15.[2]

This limited reading of Section 2 First in *BN v. BMWE* was consistent with the Court's limited view of the scope of Section 2 First from the outset of the RLA. For example, in *Virginian Ry. Co. v. System Federation No. 40, RED*, 300 U.S. 515 (1937), the Court relied on RLA Section 2 Ninth in rejecting a carrier's claim that its refusal to treat with the representative of its employees was not actionable. The Court acknowledged that such refusal to treat with a union had been held not actionable under the statute that preceded the RLA that had language similar to that of Section 2 First. However, the Court, referring to the language of Section 2 First, said that "these words [Section 2 First] no longer stand alone and unaided by the mandatory provision of the statute as they did when first enacted". 300 U.S. at 544, *citing* the 1934 amendment that added Section 2 Ninth.[3]

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[2] In the courts below, the Carriers argued that *BN v. BMWE* is irrelevant to this case because there the parties had exhausted RLA dispute resolution processes. But the Court in *BN v. BMWE* did not base its rejection of the carriers' Section 2 First claim on the fact that the parties had completed bargaining and mediation. It rejected the carriers' reliance on Section 2 First as a matter of law. In *BN v. BMWE*, the Court considered and rejected an expansive reading of Section 2 First that was premised on policy arguments similar to those presented in this case. The Court hewed to its prior precedent that a party has a cause of action under the RLA only when there is "express language" creating an "explicit obligation" involving a "'basic command' of the RLA". The Court stated that it would not find a cause of action when it was asked not only to infer that a that a statutory duty is so crucial that it may be enforced "but also that such a duty exists". *Id.* at 450-452 and n.15.

[3] *See also Texas & New Orleans R.R. Co. v. B'hood of Ry. & Steamship Clerks*, 281 U.S. 548,(1930)—while carrier interference with employee choice of representative is not actionable under Section 2 First, it is actionable under Section 2 Third; "Congress was not content with the general declaration of the duty of carriers and employees to make every

Even *CNW v. UTU*, which is the one case where the Court did find an enforceable duty under Section 2 First, the Court described a limited reading of Section 2 First as to the scope of the duty imposed, and the scope of judicial action permitted. It held only that there is a duty to deal in good faith, and that judicial enforcement is permissible to the extent necessary for that duty to be meaningful. 402 U.S. at 577-582. In this regard, it is important to recognize that the issue in that case was whether 2 First imposed any obligation at all–whether it was merely hortatory as the four dissenters said, or whether it actually imposed some duty. The Court majority rejected a suggestion in a prior case (*General Committee v. MKT, supra.)* that Section 2 First was merely a statement of policy, it then found bad faith bargaining to be actionable under Section 2 First because compliance with the Act's bargaining procedures "is meaningless if one party goes through the motions with 'a desire not to reach an agreement'". 402 U.S. at 578. On that basis, the Court concluded that the duty to exert every reasonable effort to

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reasonable effort to enter into and maintain agreements concerning rates of pay, rules and working conditions, and to settle disputes . . . but added this distinct prohibition against coercive measures [Section 2 Third]"; "[w]hile an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms [i.e. 2 First], a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded". 281 U.S. at 567-568. And *see Brotherhood of RR. Trainmen v. Chicago River & Indiana RR., supra.*, 353 U.S. at 36—the provision for mandatory arbitration of minor disputes was a reaction to the weakness of the 1926 Act which was ineffective in handling contract interpretation disputes without disruptions of commerce a "condition []in marked contrast to the declared purpose of the 1926 Act '. . . to settle all disputes whether arising out of the application of . . . agreements or otherwise, in order to avoid any interruption of commerce or to the operations of any carrier growing out of any dispute between the carrier and the employees thereof'. § 2 First". *Id.* at 36, quotations and ellipses in original.

make and maintain agreements and settle disputes required that parties bargain in good faith, and that this limited duty could be enforced in the courts.[4]

The *CNW v. UTU* Court also cited the general Norris LaGuardia Act (29 U.S.C. §101 *et seq.*) bar against injunctions in labor disputes as requiring circumspect application of Section 2 First, because "the vagueness of the obligation under Section 2 First could provide cover for a freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place". *Id.* at 583. The *CNW v. UTU* Court concluded that the result it reached flowed from its duty to give effect to all of the labor laws, and the need to reconcile mandates of different Congresses with differing political make-ups and differing views on labor relations, and to not restrict itself to pieces of legislation that are in accord with the Justices' personal views of sound labor policy. *Id.* at 583-584. Thus, in the one case where this Court found a cause of action under Section 2 First, it did not find an expansive duty, but rather a narrowly limited duty.

The panel majority's misunderstanding of this Court's decisions under Section 2 First is clearly demonstrated by its statement that Section 2 First applies to actions that interrupt

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[4] In holding that Section 2 First was not a mere statement of policy, the Court said that the duty imposed was enforceable by "whatever means appropriate on a case-by-case basis". But it did not say or mean that the courts are free to define the scope of Section 2 First as they believe fit. Rather the Court concluded only that, as to the duty that is imposed, case by case adjudication is necessary because Section 2 First did not expressly enumerate particular types of conduct that would be inconsistent with the duty to exert every reasonable effort to make and maintain agreements and settle disputes. 402 U.S. at 576, 577. Moreover, the whole context of the discussion of case by case adjudication was after a review of the history of the RLA and prior RLA precedent regarding the limited role of the courts under the Act. *Id.* at 574-577. The point of that discussion was just to show that Section 2 First is not without effect, and that it does at least create the binding obligation to bargain in good faith.

commerce, not to actions that make dispute resolution more difficult, and that "strike prevention, not dispute resolution *per se*, was 'the major purpose of the Railway Labor Act'". App. B at 9a-10a. This Court recognized in *CNW v.UTU*, that the actual duty is to exert every reasonable effort to settle disputes. That is why bad faith bargaining violates Section 2 First. While bad faith bargaining does not "in and of itself" interrupt commerce, it certainly makes dispute resolution more difficult. Contrary to the Fifth Circuit's decision, in *CNW v.UTU*, this Court recognized that dispute resolution *per se*, not strike prevention, is the major purpose of the RLA.

Moreover, as is described above, the *BN v. BMWE* case came after *CNW v. UTU;* and the *BN v. BMWE* Court applied a narrow reading of Section 2 First. It specifically described the limited reach of the holding in *CNW v. UTU*, noting that the *CNW v. UTU* decision found that the "express language of Section 2 First creates a duty to 'exert every reasonable effort' to settle disputes", and it only inferred that the duty was legally enforceable, but"[t]he language of § 2 First does not contain, however, either an express proscription of secondary activity or a suggestion that the scope of self help is limited". In *BN v. BMWE* no "'basic command' of the RLA" could be said to have been violated; and the Court was being asked to not only infer that a statutory duty was so crucial that it was enforceable by injunction, "*but also that such a duty exists*". *Id.*,emphasis added.

It is therefore clear that when *CNW v. UTU* is read together with *BN v. BMWE*, the precedent of this Court rejects the notion that Section 2 First can be violated when a union does not give advance notice of strikes because, as in *BN v. BMWE*, there is no such statutory command in Section 2 First. And as in *BN v. BMWE*, the general statement of purpose of Section 2 First is not sufficient to create the sort of new prohibition created by the Fifth Circuit, because in this

case, like *BN v. BMWE*, one would have to infer not only a right to enforcement of a purported duty, but also that a duty exists.[5]

The Court's limited readings of Section 2 First in *CNW v. UTU* and *BN v. BMWE* were consistent with its many decisions defining a limited role for the courts under the RLA. In *Texas & New Orleans R.R. Co., supra.* 281 U.S. at 563-566, the Court described the RLA as the result of an agreement by labor and management that generally provided mechanisms for adjustment disputes between the parties, with only certain limited obligations enforceable in court. In *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 300(1943), the Court stated that the courts have jurisdiction to enforce the RLA only when "the absence of jurisdiction of the federal courts mean[s] a sacrifice of a right which Congress had created". And in *General Committee of Adjustment v MKT, supra.,* the Court stated that the statute relied heavily on "mediation, conciliation and arbitration . . . in addition to the available economic weapons . . ." and that only in "certain phases of this controversial subject" had Congress relied on "compulsions of the law". 320 U.S. at 322-323. The Court observed that "Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or to far. The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." *Id.* at 322. The Court further stated that "in view of the pattern of

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[5] In the courts below, the Carriers argued that BMWE contends that Section 2 First creates no duties. BMWE recognizes that such a position was rejected in *CNW v.UTU*. But, BMWE submits that this Court's decisions hold that Section 2 First creates only the limited duty to bargain in good faith, and the RLA establishes only specific duties based on express commands, not open-ended duties based on stated goals.

this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable [sic] in the courts should be implied". *Id.* at 337. And more recently, the Court in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants, supra.*, 489 U.S. at 441, held that a carrier did not violate the RLA by hiring "replacement workers" during a strike and giving bidding preferences to employees who work during a strike, stating that "we have understood judicial intervention in RLA procedures to be limited to those cases where 'but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the'" RLA. 489 U.S. at 442 citations omitted.

Thus, it is clear that the Fifth Circuit has created a duty that does not exist under the RLA, and applied Section 2 First in a way that directly conflicts with decisions of this Court that have rejected broad readings of Section 2 First and repeatedly limited the scope of application of that provision.

II. THE COURTS BELOW EFFECTIVELY AMENDED THE RLA BY JUDICIAL ACTION BASED ON A LABOR RELATIONS POLICY NOT EXPRESSED IN THE STATUTE; If ALLOWED TO STAND, THESE DECISIONS WILL HAVE A RADICAL IMPACT ON APPLICATION OF THE RLA

BMWE also respectfully submits that the Court should review the decision of the Fifth Circuit because the Court of Appeals exceeded its authority by effectively amending the RLA by judicial fiat, thereby significantly altering the labor relations scheme for two important industries.

The language of Section 2 First is as follows:

> It shall be the duty of all carriers, their officers agents and employees to exert every reasonable effort to make

> and maintain agreements concerning rates of pay rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

There is nothing in that provision that requires advance notice before a party exercises self help. As is noted above, unlike RLA Section 6 (45 U.S.C. § 156), there is no Section 2 First specification of any procedural requirements that must be followed before a party exercises self help. However, the courts below held that BMWE violated Section 2 First solely because the Union had not given advance notice of strike plans in a number of disputes, and therefore could be ordered to give advance notice in future disputes. In doing so, the courts below created a duty, and found a violation of law, without any basis in the language of the statute.

In the absence of any statutory language actually requiring advance notice, the courts below held that the general Section 2 First duty to exert every reasonable effort to make and maintain agreements and to settle disputes, and the expressed *purpose* of that provision to avoid disruptions of commerce, supported a permanent injunction under Section 2 First requiring BMWE to give advance notice of its plans to exercise self help. But in doing so, the Courts below confused the *goal* of Section 2 First with the actual *duty* it imposes.

As is clear from *CNW v. UTU* and *BN v. BMWE*, the only duty imposed is to exert every reasonable effort to make and maintain agreements and to settle disputes. Parties are not required to settle or refrain from disrupting commerce, only to confer and make every reasonable effort to resolve a dispute. That duty does not require a party to forego the use of self help in favor of making or maintaining an agreement that the party would not otherwise accept, or to acquiesce in a

settlement of a dispute that it deems unsatisfactory. *Detroit and Toledo Shore Line R.R. v. United Transportation Union*, 396 U.S.142(1969); *BN v. BMWE*. The duty imposed by Section 2 First does not restrict the manner in which a party exercises self help once every reasonable effort to settle has been made. *BN v. BMWE*. Nor does Section 2 First establish procedural steps that must be followed prior to the exercise of self help.

The courts below expressed concern about the fact that there were multiple cases in which BMWE struck without advance notice. App. B at 4a-5a, 7a, 9a; App. C at 34a-44a. But that fact cannot in and of itself support a finding of a violation of Section 2 First. There is no statutory requirement for advance notice, so there is no violation of the statute just because there were a number of cases where no advance notice was given. If there actually was an RLA prohibition against strikes without advance notice, evidence of multiple strikes without notice could be relied on as supporting a prospective advance notice injunction. But, while repetition of unlawful behavior may be an appropriate consideration in formulation of a remedy when there is a violation of law, repetition itself does not make behavior unlawful.

Moreover, in none of the previously litigated cases cited by the courts below was BMWE found to have violated a supposed Section 2 First duty to give advance notice of strikes. Rather, the courts in those cases found that BMWE violated RLA Section 3 by striking over disputes that were required to be arbitrated. BMWE submits that since only a violation of a duty imposed by Section 2 First is actionable, the courts below erred in finding a Section 2 First violation and granting an injunction under Section 2 First based on the goal of that provision and multiple instances of violations of RLA Section 3 that were all litigated in prior cases.

Ultimately, the basis for the injunction appears to be the assessment of the courts below that RLA Section 3 is

deficient. Although RLA Section 3 has permitted issuance of temporary restraining orders against strikes within hours, and allows for quick classification of disputes as major or minor, Section 3 has not operated to stop strikes before they start. The courts below allowed the advance notice injunction because they concluded that it would control conduct that was not regulated by RLA Section 3, and they viewed such an order as consistent with the broadly phrased goal of preventing interruptions of commerce that is expressed in Section 2 First. App. B at 6a, 9a-11a; App. C at 33a-34a, 61a-64a. But, BMWE can not be found to have violated the RLA because its actions were deemed to be inconsistent with the statute's goals, as opposed to its actual commands. Moreover, in affirming the advance notice injunction, the Fifth Circuit disregarded this Court's express admonition in *CNW v. UTU* that courts must be circumspect in applying Section 2 First, because "the vagueness of the obligation under Section 2 First could provide cover for a freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act". 402 U.S. at 583. And in reading Section 2 First to impose an enforceable duty based on its "general language" and broad purpose of preventing strikes the Fifth Circuit followed a path expressly rejected by this Court in *BN v. BMWE*. 491 U.S. at 450-452.

Thus, in construing Section 2 First to impose an obligation that does not exist in the statute because they viewed that obligation as consistent with the goal of Section 2 First, the courts below not only applied the statute in a manner that conflicts with this Court's decisions, they also found an RLA violation and issued and injunction based on their own notions of "common sense" and "good policy". But courts cannot create statutory obligations in order to cover conduct that they believe should be regulated by creating a regulatory scheme where none actually exists in the law. There are places where rail labor believes that the RLA is deficient because it does not cover, or permits, certain types of carrier

action, but the law must be changed by Congress, not the courts. This is especially true with respect to this statute, which was enacted as negotiated by the regulated parties, and representatives of the parties, and key members of Congress, described the RLA as providing for only limited judicial and administrative involvement; and they expressly stated that they viewed the statute as primarily creating processes that would enhance the likelihood of settlement of disputes while generally providing for limited government involvement in labor-management relations.

As this Court observed in *CNW v. UTU* and *BN v. BMWE*, the courts cannot usurp the role of Congress by effectively re-writing the RLA to comport with their own views of proper labor policy, rather than applying the policy adopted by Congress 76 years ago. 402 U.S. at 583-584, 481 U.S. at 443, 452.

BMWE further submits that if the Decision below is allowed to stand, it will substantially broaden the type of conduct that will be covered by Section 2 First and greatly expand the role of the courts in the administration of the Act. Whereas other RLA duties are enforceable because they involve specific and express commands of the statute, the decisions below create a wholly new enforceable obligation out of a general goal. The enforcement of this new duty will necessarily require the courts to supervise and examine the tactics of labor and management. Actions that now are permissible for both unions and management would violate this new Section 2 First duty created by the Fifth Circuit.

In *Pittsburgh & Lake Erie R.R. v. RLEA*, 491 *U.S.* 490 (1989), this Court held that a carrier had no obligation to negotiate over its decision to go out of business (*id.* at 507-510), and no obligation to maintain the status quo (*i.e.* remain in business) while bargaining over the effects of a decision to go out of business. *Id.* at 512. However, under the Fifth Circuit's expansive view of Section 2 First, there would be a

cause of action in that situation because the carrier's position could be described as inconsistent with a duty to exert every reasonable effort to resolve the dispute.

Similarly, in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants, supra.*, 489 U.S. at 441, the Court held that a carrier can hire "replacement workers" during a strike, and give bidding preferences to employees who work during a strike, without violating RLA Sections 2 Third and Fourth. But such actions would be inconsistent with the Section 2 First duty as re-defined by the courts below because they clearly would diminish the likelihood of settlement of the underlying dispute.

Under the reasoning of the Fifth Circuit's decision, either party's refusal of an offer of interest arbitration could be violative of the new expansive reading of Section 2 First, even though interest arbitration is voluntary under RLA Section 7. And courts could be called-upon to determine whether a union or a carrier has acted in good faith by refusing to settle a minor dispute, by refusing to maintain the status quo pending arbitration or by refusing to follow an adverse arbitration ruling in a later case. Under Fifth Circuit's reading of Section 2 First, a union or a carrier could be compelled by a court to produce information for use in grievance handling and arbitration because that might facilitate settlement of the dispute, even though courts have held that no such duty exists elsewhere in the RLA. *See e.g., Pacific Fruit Express v. Union Pacific*, 826 F. 2d 920, 922-23 (9th Cir. 1987).

In each of the situations described above, it could be argued that although the party's action does not violate some express command of another part of the RLA, the party would certainly be acting in a manner inconsistent with, and in violation of, the Fifth Circuit's interpretation of Section 2 First based on the broadly read duty to exert every reasonable effort to settle, and the expressed goal of that provision.

Courts would have to supervise this obligation and determine whether one side or the other is being too aggressive or has over-responded to a provocation. This has not been the approach of the RLA which recognizes that there will be disputes, but which limits the involvement of the Courts to circumstances when it is necessary to enforce an express, specific prohibition. That is why the Court in *CNW v. UTU* was so careful to limit the scope of actionable conduct under Section 2 First. And that is why the *BN v. BMWE* Court rejected the Carriers' prior effort to create a duty out of the "general language of Section 2 First" and its purpose. But now the Fifth Circuit has adopted a broad reading of Section 2 First, expanding the scope of actionable conduct of unions and carriers in a manner that is without basis in the language of the statute and conflicts with prior decisions this Court. If this decision is not reversed, both labor and management will bring before the courts challenges to a whole host of tactics and actions that have not previously been regulated by the RLA, and have not been subject to judicial oversight.

Regardless of one's view of BMWE's actions, the courts may not regulate its actions in the absence statutory authority. It is therefore necessary for this Court to review the decision below to reverse this judicial usurpation of the role of Congress in setting labor policy and the scope of regulation of union and carrier conduct.

CONCLUSION

For the foregoing reasons, BMWE respectfully urges the Court to issue a writ of certiorari to the Court of Appeals for the Fifth Circuit to review and reverse the judgment of that Court in *Burlington Northern And Santa Fe Railway Company, et al. v. Brotherhood of Maintenance of Way Employes supra.*

Respectfully submitted,

Of Counsel:
WILLIAM A. BON
General Counsel
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
26555 Evergreen Road, Suite 200
Southfield, MI 48076
(248) 948-1010
SANFORD R. DENISON
BAAB & DENISON, L.L.P.
2777 N. Stemmons Freeway
Suite 1100
Dallas, TX 75207-2228
(214) 637-0750
November 27, 2002

RICHARD S. EDELMAN *
O'DONNELL, SCHWARTZ, ANDERSON, P.C.
1900 L Street, N.W.
Suite 707
Washington, D.C. 20036
(202) 898-1824
* Counsel of Record

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed Aug. 30, 2002]

No. 01-10538

BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY; CONSOLIDATED RAIL CORPORATION; CSX TRANSPORTATION, INC.; KANSAS CITY SOUTHERN RAILWAY COMPANY; NORFOLK SOUTHERN RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY,

Plaintiffs-Counter Defendants-Appellees,

versus

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,

Defendant-Counter Claimant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion 286 F.3d 803 (5th Cir. Apr. 4, 2002))

Before SMITH and DEMOSS *Circuit Judges*, and DUPLANTIER,* *District Judge*.

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* District Judge of the Eastern District of Louisiana, sitting by designation.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges in regular active service not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing *en banc* is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-10538

BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY; CONSOLIDATED RAIL CORPORATION; CSX TRANSPORTATION, INC.; KANSAS CITY SOUTHERN RAILWAY COMPANY; NORFOLK SOUTHERN RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY,

Plaintiffs-Counter Defendants-Appellees,

versus

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,

Defendant-Counter Claimant-Appellant.

April 4, 2002, Decided

Before SMITH and DEMOSS, *Circuit Judges*, and DUPLANTIER,* *District Judge*. DUPLANTIER, *District Judge, dissenting*.

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* District Judge of the Eastern District of Louisiana, sitting by designation.

OPINION:

JERRY E. SMITH, *Circuit Judge*:

I.

A union appeals an injunction issued under the Railway Labor Act ("RLA"). The six appellee railroad carriers have obtained, on summary judgment, an injunction against appellant Brotherhood of Maintenance of Way Employees ("BMWE") requiring it to give ten days' notice before initiating a "strike, work stoppage, picketing or other self help" against any of the carriers. *Burlington N. & Santa Fe R.R. v. BMWE*, 143 F. Supp. 2d 672, 696 (N.D. Tex. 2001) ("Burlington Northern"). In that published Memorandum Opinion and Order, the district court provides an impressive and detailed evaluation of the facts and law and a persuasive explanation of its reasons for entering the injunction. Finding no error, we affirm, essentially on the basis of the district court's well-crafted opinion, except to the extent that we provide further analysis below.

As the district court found, the BMWE has a long history of launching strikes without warning, including many that are illegal under the RLA. See *id.* at 694 (finding that "the court can, and does, infer from the facts thus found that BMWE has a pattern, practice, and policy of authorizing, encouraging, permitting, calling or engaging in strikes, work stoppages, picketing, and other self-help against plaintiffs and their subsidiaries over what BMWE claims are unilateral changes in agreements . . . . The conduct of the BMWE in engaging in activities of that kind without giving the affected carrier advance notice . . . violates BMWE's duties under § 152 First."). Since 1993, "BMWE has struck, attempted to strike, or threatened to strike plaintiffs at least eighteen times, including nine cases in which pickets went up and/or operations were disrupted until the affected plaintiff was able to obtain a temporary restraining order." 143 F. Supp. 2d at 679.

In the year preceding the injunction, "BMWE . . . accelerated its practice of strikes against the plaintiffs, with four incidents" between February 2000 and early 2001. *Id.* "In each case, BMWE planned its strike in secret and made every effort to implement the strike before the affected carrier could obtain a temporary restraining order." *Id.*[1]

BMWE claims that its policy of surprise strikes does not violate the RLA and that the injunction is forbidden by the Norris-LaGuardia Act ("NLGA"). We conclude that the BMWE's actions violated its duties under the RLA and that the NLGA does not bar an injunction under the specific circumstances of this case.

II.

A.

We first consider the BMWE's duties under the RLA. It is well established that "the major purpose of Congress in passing the Railway Labor Act was to provide a machinery to prevent strikes." *Tex. & New Orleans R.R. v. Bhd. of Ry. & Steamship Clerks,* 281 U.S. 548, 565, 74 L. Ed. 1034, 50 S. Ct. 427 (1930) (quotations omitted). To further this goal, § 152 First of the RLA comprehensively requires that labor and management "exert every reasonable effort . . . to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

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[1] The district court made these factual findings without an evidentiary hearing; it provides a detailed explanation of why it believes no hearing was required. *Burlington Northern,* 143 F. Supp. 2d 672, 2001 U.S. Dist. LEXIS 5467 at *45-55. We do not consider whether this was error, because BMWE does not raise the issue as a ground for reversal. "We liberally construe briefs in determining issues presented for review; however, issues not raised at all are waived." *Carmon v. Lubrizol Corp.,* 17 F.3d 791, 794 (5th Cir. 1994).

45 U.S.C. § 152 First (1994) (emphasis added). "The obligation under § [152] First is central to the effective working of the Railway Labor Act," and compliance therefore can be enforced by injunction. *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 578-79, 29 L. Ed. 2d 187, 91 S. Ct. 1731 (1971).

BMWE contends that the legislative history of the RLA mandates a narrower construction of the RLA than the text alone would dictate. Even if the BMWE's view of the legislative history is sound, this argument is unavailing, because "legislative history is relegated to a secondary source behind the language of the statute in determining congressional intent; even in its secondary role legislative history must be used cautiously." *Aviall Serv., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134, 140-41 (5th Cir.) (internal citations omitted), vacated for rehearing en banc, 278 F.3d 416 (5th Cir. 2001).[2]

BMWE's deliberate policy of repeatedly calling surprise strikes violates the statutory requirement that railroads and unions "exert every reasonable effort . . . to settle all disputes . . . in order to avoid any interruption to commerce." 45 U.S.C. § 152 First. A surprise strike makes it difficult or impossible to resolve the underlying dispute between labor and management without "interruption to commerce." *Id.* Because management is unaware that a strike is impending, it cannot take steps that might prevent it. In cases where the contemplated surprise strike is illegal under the RLA, the carrier cannot obtain an injunction against it until after the strike has begun and an "interruption to commerce" has already occurred.

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[2] *Cf. Garcia v. United States*, 469 U.S. 70, 75, 83 L. Ed. 2d 472, 105 S. Ct. 479 (1984) (holding that "only the most extraordinary showing of contrary intentions would justify a limitation on the 'plain meaning' of the statutory language").

In addition to violating § 152 First, many of BMWE's surprise strikes were held to be in violation of the requirement that unions can resort to strikes in a dispute over "minor" issues only if they first have exhausted the RLA's compulsory dispute resolution mechanisms. *Burlington Northern*, 143 F. Supp. 2d at 680-85 (describing seven cases in which BMWE was enjoined from striking the appellees because the dispute at issue was minor).[3] This circumstances strengthens the conclusion that BMWE was engaged in a pattern of illegal activity.

B.

Precedent from other circuits supports this conclusion. Judge Leventhal, writing for the District of Columbia Circuit, held that "the continuing duty of responsible bargaining under the [RLA] fairly embraces reasonable notice of a strike or lockout or other self help." *Del. & Hudson Ry. v. United Transp. Union* , 146 U.S. App. D.C. 142, 450 F.2d 603, 622 (D.C. Cir. 1971). BMWE's argument that *Delaware & Hudson* was not decided under § 152 First is irrelevant, because the reasoning of the court is based on a generalized RLA "duty of responsible bargaining" that applies to § 152 First as readily as to other provisions of the Act.[4] *Id.*

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[3] See *Burlington N.R.R. v. BMWE*, 961 F.2d 86, 89 (5th Cir. 1992) (describing RLA dispute resolution procedures for "minor" disputes and holding that resort to them before striking is mandatory).

[4] It is also incorrect to claim, as BMWE does, that Delaware & Hudson's language requiring notice is mere dictum. The language occurs in the same part of the opinion as do the instructions to the district court, which had "continuing jurisdiction" over the dispute "for such further proceedings as may become appropriate, not inconsistent with the opinion of this Court." *Delaware & Hudson*, 450 F.2d at 623.

The District of Columbia Circuit evidently expected that, although it had overturned an earlier injunction, an anti-strike injunction, possibly including a notice provision, might become necessary. Indeed, the

The Eleventh Circuit recently has held that "when the public interest, commerce, and a clear statutory provision are implicated, we will not shy away from holding the parties to their duties under the RLA so as to avoid 'any interruption to commerce.'" *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 238 F.3d 1300, 1308 (11th Cir.) (quoting § 152 First), cert. denied, 532 U.S. 1019, 149 L. Ed. 2d 754, 121 S. Ct. 1958 (2001). That court held that § 152 First's requirement that the parties "exert every reasonable effort to make and maintain" agreements qualified as a "clear statutory provision" that could be enforced by injunction whenever there is a threat of "any interruption to commerce." Id. The same reasoning applies to the section's mandate that labor and management "exert every reasonable effort . . . to settle all disputes . . . in order to avoid any interruption to commerce," which occurs in the same sentence of § 152 First as does the provision enforced by the Eleventh Circuit.

Because we are persuaded by the plain text of the statute, by the reasoning of the District of Columbia and Eleventh Circuits, and by the desirability of avoiding a circuit split, we easily conclude that the BMWE did indeed violate its statutory duties under § 152 First. We need not, however, go

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language asserting a requirement of notice immediately follows the court's condemnation of an earlier union effort to "call a strike . . . without direct notice to the railroads." 450 F.2d at 622.

The circuit court likely feared that such action might be repeated. It noted that the union's earlier strike activity was "lawful" only because of "an assumption of good faith as to its stated purpose of the strike" and warned that "the District Court has continuing jurisdiction to reappraise the union's good faith in the light of either substantial evidence not previously available or developments as to tactics and methods following notice to the carriers of the strike call." *Id.* at 623 (emphasis added). The latter passage suggests that the circuit court may have expected that the district court would not allow future strikes without prior "notice to the carriers of the strike call." *Id.*

as far as the District of Columbia Circuit did in concluding that any "deliberate timing of a strike without prior warning" violates the statute. *Delaware & Hudson*, 450 F.2d at 622. For purposes of the present case, we decide only that the statute forbids an ongoing, repeated practice of surprise strikes that are doomed later to be held illegal and enjoined. *See Burlington Northern*, 143 F. Supp. 2d at 679-85 (describing extensive history of surprise strikes by the BMWE against appellees that later were enjoined). We need not and do not address the question whether the RLA forbids all surprise strikes. Nor do we need to reach the Eleventh Circuit's holding that anti-strike injunctions are appropriate any time a union's violation of a "clear statutory provision" threatens "interruption to commerce." *Delta*, 238 F.3d at 1308.

C.

BMWE argues that recognizing an enjoinable statutory duty to avoid surprise strikes under § 152 First also would allow courts to enjoin a variety of other union and management practices that arguably evidence a failure to "exert every reasonable effort . . . to settle all disputes." 45 U.S.C. § 152 First. For example, BMWE claims that a broad interpretation of § 152 First would allow courts to enjoin carriers' refusals to settle a minor dispute or to maintain the status quo pending arbitration.

These and other similar examples are readily distinguishable from surprise strikes, because § 152 First applies only to actions that cause "interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. § 152 First. The actions posited by BMWE, while they may make dispute resolution more difficult, do not, in and of themselves, interrupt commerce, while surprise strikes undeniably do. And strike prevention, not dispute resolution per se, was "the

major purpose of Congress in passing the Railway Labor Act." *Texas & New Orleans*, 281 U.S. at 565.

III.

A.

Having concluded that the BMWE's actions violated the RLA, we turn to the question whether the injunction is barred by the NLGA. That statute "expresses a basic policy against the injunction of the activities of labor unions." *Int'l Bhd. of Machinists v. Street*, 367 U.S. 740, 772, 6 L. Ed. 2d 1141, 81 S. Ct. 1784 (1961) (citing 29 U.S.C. § 101). Nonetheless, "the [NLGA] does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act." *Id.*

When considering requests for injunctive relief under the RLA, "courts should hesitate to fix upon the injunctive remedy unless that remedy alone can effectively guard the plaintiff's right." *Chicago & North Western*, 402 U.S. at 582. The Supreme Court, however, also has said that the NLGA does not bar injunctive relief under § 152 First, reasoning that "we find it quite impossible to say that no set of circumstances could arise where a strike injunction is the only practical, effective means of enforcing the command of § [152] First." *Id.*

BMWE's strategy of calling numerous surprise strikes is precisely the sort of violation of the RLA for which an injunction "is the only practical, effective" remedy. *Id.* BMWE repeatedly has demonstrated its willingness to call surprise strikes that violate its obligations under the RLA. Normally, such illegal conduct could be deterred through after-the-fact actions for damages. This court, though, specifically has held that there is no damage remedy for violations of § 152 First. *See Burlington N. R.R. v. BMWE*, 961 F.2d 86, 89 (5th Cir. 1992); *Nashville R.R. v. Brown*, 252 F.2d 149, 155 (5th Cir. 1958).

Preemptive injunctive relief is the only available remedy for illegal surprise strikes by the BMWE. An injunction issued only after an illegal strike has begun cannot undo the damage caused to the carriers from the beginning of the strike to the issuance of the injunction.

More importantly, an after-the-fact injunction cannot prevent the "interruption of commerce" that will have occurred during this period; stopping such disruption is, as we have seen, the main purpose of the RLA. 45 U.S.C. § 152 First. Finally, after-the-fact injunctions would not give the BMWE any incentive to refrain from illegal strikes in the first place, because it still would receive the benefit of any damage to the carriers inflicted before the injunction went into effect.

To be sure, the district court could have chosen to enjoin only unambiguously illegal surprise strikes—those that are over "minor" issues. But if the carrier learns of the strike only after the fact, it cannot litigate the "major-minor" issue until after the strike has begun. At that point, if the carriers prevail in court, they still will not receive compensation for the disruption of operations inflicted by the strike while it lasted.

The case might well be different if the BMWE had not utilized illegal surprise strikes on so many occasions. If such tactics were limited to rare, isolated instances, there might be no need for an injunction to address the problem, which would be unlikely to recur. In the present case, however, a long history of systematic abuse left the district court with no choice but to resort to an injunctive remedy. There was no other way to prevent the extensive disruption of commerce and damage to the carriers caused by an ongoing policy of surprise strikes.

B.

BMWE argues, nonetheless, that, under the NLGA, the injunction is improper in light of *United States Steel Corp. v. United Mine Workers,* 519 F.2d 1236 (5th Cir. 1975). There, we did indeed condemn "overbroad use" of anti-strike

injunctions; we required that "every order granting an [anti-strike] injunction . . . shall be specific in its terms, shall describe in reasonable detail, and not by reference to the complaint or other document the act or acts sought to be restrained." *Id.* at 1245-46.

United States Steel is readily distinguishable from the present case. The injunction against BMWE is much less sweeping than that in United States Steel, which "was nothing less than an injunction against striking for the life of the contract[,] an order to work every day." *United States Steel,* 519 F.2d at 1245. Here, the court merely required ten days' notice of a strike and did not come close to enjoining the right to strike itself.

Second, United States Steel is distinguishable because it was decided under Supreme Court precedent that forbids enjoining any strike under the Taft-Hartley Act absent "a finding in each case that the strike was over an arbitrable issue." *Id.* There is no such requirement under the RLA.

United States Steel's requirement that "every order granting an [anti-strike] injunction . . . shall be specific in its terms [and] shall describe in reasonable detail . . . act or acts sought to be restrained," 519 F.2d at 1245-46, presumably is still applicable to the present case. The injunction does not run afoul of it, however. The injunction undeniably is "specific in its terms," requiring that the union provide ten days' notice of all strikes against the plaintiff carriers. *Id.* Unlike the situation in United States Steel, in which there was "no specific act . . . complained of in the motion for . . . injunction," here the carriers complain of a longstanding BMWE strategy of calling surprise strikes that violate the RLA. *Id.* at 1246.

IV.

In summary, BMWE has persisted in undermining the purposes of the RLA by repeatedly engaging in strikes that are plainly unlawful. The district court has carefully tailored a remedy designed to take care of this specific factual situation. Following the lead of two sister circuits that have approved the availability of injunctions to thwart similar violations of law, we AFFIRM the judgment of permanent injunction.

DUPLANTIER, *District Judge, dissenting*:

The Railway Labor Act, 45 U.S.C. § 151, *et seq.*, (RLA) regulates in great detail the relationship between railroads and the unions which represent railway employees. Section 152 First of the RLA provides that carriers and their employees have a duty "to exert every reasonable effort . . . to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." Because I conclude that a court has no authority to add to that duty a requirement that a railway union provide advance notice before engaging in a strike, work stoppage, or other job action against a carrier, I respectfully dissent.

Appellant Brotherhood of Maintenance of Way Employees (BMWE) is a labor union which represents those employees of numerous railroads who are responsible for maintaining, repairing and rehabilitating railroad tracks throughout the United States. Since 1993 BMWE has engaged in twelve strikes or planned strikes, each one against at least one of the six railroads who are plaintiffs in this suit. In each instance, the union gave no advance notice to the railroad of its intent to commence a strike. The railroad in question ultimately obtained injunctive relief against each of the strikes, on the ground that the dispute which gave rise to the strike was a "minor dispute," as to which a strike is unlawful. *See Consolidated Rail Corp. v. Rail way Labor Executives' Assn.*, 491 U.S. 299, 304, 105 L. Ed. 2d 250, 109 S. Ct. 2477 (1989). In each injunction suit brought by the railroad, the union contended that the strike or planned strike was lawful, primarily because the disagreement between the parties involved a major dispute. Where a major dispute is involved, a party may resort to a strike after exhausting the bargaining and mediation process mandated by §§ 5 and 6 of the RLA. *Id.* at 303.

None of the statutes regulating the relationship between railroads and the unions representing railroad employees requires advance notice of a union's intention to strike, and during the many years since the enactment of those statutes, no railroad has sought a statutory amendment to require such notice.[1]

This suit, which was not filed in response to a strike or in anticipation of a threatened strike, represents in effect an attempt by the railroads to amend the RLA through judicial interpretation rather than legislative amendment, a tactic one carrier has previously tried unsuccessfully.[2]

The six railroad appellees initiated this suit, seeking a declaratory judgment to the effect that BMWE has violated § 152 First, by authorizing, encouraging, permitting, calling, or engaging in self-help, including strikes, without notice, over disputes involving what BMWE characterizes as unilateral changes in agreements, and by engaging in such conduct as a pattern, practice, or policy. The railroads also sought an injunction requiring BMWE in the future to give ten days advance notice of its intent to commence any job action against any of the plaintiff railroads, thereby giving the railroad the opportunity to obtain a restraining order in advance of the threatened union action. The railroads urged

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[1] At oral argument, counsel for the railroads advised that in the 76 years since the RLA's enactment no railroad had ever sought such an amendment from Congress.

[2] In 1998, Burlington Northern and Santa Fe Railway Company, an appellee herein, filed suit in the Northern District of Texas seeking, among other things, a mandatory injunction requiring the union to give 3 days advance notice of future strikes. *Burlington N. & Santa Fe Ry. Co. v. Brotherhood of Maintenance of Way Employees*, 93 F. Supp. 2d 751 (N.D. Tex. 2000) The district judge denied the railroad that relief but suggested that on a different record such an injunction regulating future conduct by the union might be justified. *Id.* at 760. The district court's denial of the injunction was not appealed.

that the advance notice requirement was warranted to prevent significant economic losses resulting from an illegal strike, losses for which the railroads cannot recover damages from the unions. *See Louisville & Nashville Railroad Company v. Brown*, 252 F.2d 149, 155 (5th Cir. 1958).

The district court granted the railroads' motion for summary judgment, based in large part upon the decisions in eighteen prior suits [3] between the railroads and BMWE over an eight year period in nine different federal district courts. Each of these suits resulted ultimately in a grant of a railroad's petition for an injunction halting an ongoing strike or prohibiting what was perceived as a threatened strike. In granting the injunction on appeal before us, the district court also relied upon statements made by union executives in depositions and press releases. Upon this summary judgment record the railroads convinced the district court that BMWE had demonstrated a pattern, practice, and policy of engaging in illegal self-help activities. Based upon that finding, the district judge in effect amended the RLA (as applicable to parties to this litigation), to add a requirement that the union must give the railroad ten days advance notice before initiating any job action, including a strike. The injunction contained no temporal or geographic limitation, nor was it restricted only to union actions taken in response to specific circumstances.

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[3] In his Memorandum Opinion and Order the district judge refers to eighteen suits in which a temporary restraining order or an injunction was issued against the union. *Burlington N. & Santa Fe Ry. v. BMWE*, 143 F. Supp. 2d 672, 679-685 (N.D. Tex. 2001). However, only nine involved actual strikes by the union. The other nine involved either what the railroads perceived as a threatened strike, including what the district court characterized as situations where "BMWE refused to provide assurance that it would not strike," or a counterclaim filed by the carrier seeking an injunction in a suit initiated by the union.

While advance notice of a union's intent to strike or to utilize any self-help action may be a laudable objective in any comprehensive statute regulating the relationship between railway unions and railroad carriers, such as the RLA, the statute cannot be construed to impose such an obligation upon a union.

I agree with the majority that the district court's opinion provides "a persuasive explanation of its reasons for entering the injunction," but I disagree that it supports the judgment granting the injunction. A requirement of advance notice of intent to strike may well be sound public policy; however, the imposition of such a requirement is for Congress, not the court.

The procedural history of the RLA is significant and somewhat unusual. After extensive negotiations, the railway unions and the railroads presented a proposed statute to Congress, which enacted into law the precise agreement submitted by the unions and the carriers. Thus the RLA strikes a delicate balance between the competing interests of the unions and the carriers. The advance notice requirement imposed by the district court forever shifts the balance embodied in the RLA, as between the plaintiff railroads and the BMWE.

The importance of maintaining the delicate balance embodied in the RLA has been consistently recognized. In both *Norfolk Southern Ry. Co. v. Brotherhood of Locomotive Engineers,* 217 F.3d 181, 190 (4th Cir. 2000) and *CSX Transportation, Inc. v. Marquar,* 980 F.2d 359, 380 (6th Cir. 1992), the court relied upon the desirability of maintaining this delicate balance between the railroads and the railway unions as the rationale for denying railroads the right to recover damages from unions which had breached their duty to arbitrate a minor dispute by engaging in an illegal strike. As noted above, the railroads contend they should be granted an injunction because they cannot recover damages for an

unlawful strike. The very reason for denial of damages applies equally to an injunction: "damages awards between railroads and unions . . . threaten the delicate balance intended by the RLA." *Id.* So too would the court-created advance notice requirement at issue here.

Had Congress wanted to impose a duty of advance notice on unions, it certainly knew how to do so. In my view, the district court usurped the legislative function of Congress by imposing a duty that may well be beneficial for the common good, but is not authorized by § 152 First or any other statute.

In affirming the district court, the majority relies in part upon the desire to avoid a split between the circuits. I submit that denial of the injunction sought by the railroads would not create a circuit split. Neither case cited by the majority involved the situation presented here: an injunction for an unlimited period of time, involving future activity under unspecified circumstances, in a suit filed at a time when no adverse activity by the union is pending or then threatened. In *Delta Air Lines, Inc. v. Air Line Pilots Ass'n. Int'l,* 238 F.3d 1300, 1311 (11th Cir. 2001), the court limited the injunctive relief to directing the union "to take further steps to end the pilots' no-overtime campaign" then pending. In *Del. & Hudson Ry. Co. v. United Transp. Union,* 146 U.S. App. D.C. 142, 450 F.2d 603 (D.C. Cir. 1971), the court of appeals reversed the district court's order enjoining the union then involved in a wage and rule dispute with various railroads from conducting a selective strike against fewer than all of the plaintiff railroads. The court concluded that the district judge granted the injunction based upon an erroneous legal premise. The court of appeals remanded the case, subject to the continuing jurisdiction of the court of appeals, noting that the obligation of a carrier and a union "to treat with each other through responsible conduct of the process of collective bargaining . . . is not consistent with such actions as a deliberate timing of a strike without prior warning, with the

purpose of enhancing plant damage, or some other garrotte of jungle warfare." 450 F.2d at 622 (internal quotation and citation omitted,). I respectfully disagree with the majority's conclusion that the quoted statement is not dicta. Needless to say, the denial of an injunction in the instant case could not cause a split with another circuit which also denied an injunction. *Moreover, Del. & Hudson Ry. v. United Transp. Union* did not involve a request for an injunction such as the one at issue in this case. There, unlike here, there was a specific disagreement and a specific threatened act triggering a request for specific injunctive relief.

Moreover, assuming arguendo that § 152 First authorizes a court to impose a duty of advance notice upon a union which has demonstrated in the past a pattern, practice or policy of illegally engaging in self-help, the summary judgment evidence before the district court does not support its conclusion that appellant has engaged in such illegal activities.

Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c). A genuine issue of fact exists where the evidence is such that a reasonable party could return a verdict for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The moving party must "demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If the moving party satisfies that burden, then the non-movant must go beyond the pleadings and identify specific facts demonstrating that there is a genuine issue of material fact for trial. 477 U.S. at 324. Factual controversies are resolved in

favor of the non-moving party. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

The majority declines to consider whether it was error for the district court to make "factual findings without an evidentiary hearing . . . because BMWE does not raise the issue as a ground for reversal." What the union clearly does raise on appeal is that the summary judgment record does not support the district court's characterization of the union's prior activities as an unlawful "pattern, practice, and policy of authorizing, encouraging, permitting, calling, or engaging in strikes, work stoppages, picketing, or other self-help" against the railroads. BMWE's briefs clearly challenge the district court's findings of undisputed facts to support summary judgment. Indeed, the record excerpts submitted on appeal by BMWE include the affidavits of Steven V. Powers, the assistant to the president of the BMWE, in which he sets forth specific facts disputing various "undisputed material facts" relied upon by appellees in moving for summary judgment.

To conclude that BMWE's pattern of behavior warrants imposing a requirement that it provide advance notice of its intent to utilize self-help, it is not enough simply to look at the union's "won-loss" record in previous litigation. To reach such a conclusion it would be necessary to examine the background of each suit to determine whether the union undertook the challenged activity with a reasonable belief that the dispute giving rise to the challenged or threatened activity constituted a major dispute between the parties, which would have justified the strike which was the subject of the suit. That inquiry is essential because, as the Supreme Court has recognized, "distinguishing between major disputes and minor disputes" can be a "difficult task." *Consolidated Rail Corp. v. Railway Labor Executive Assn.*, 491 U.S. at 310. The validity of that observation is borne out by the following analysis of the prior suits between appellant and appellees.

In two of the nine suits involving actual strikes, the union prevailed at the district court level, only to lose on appeal.[4] Additionally, in *Atchison, Topeka & Santa Re* [sic] *Ry. Co. v. Brotherhood of Maintenance of Way Employees*, No. 94C2765 (N.D. Ill. May 4, 1994), in granting the railroad a temporary restraining order after concluding that a minor dispute was involved, the district court acknowledged that "BMWE raised a substantial argument" that the dispute at issue was properly characterized as a major dispute. The railroads do not challenge the union's contention that in three additional situations the railroads voluntarily ceased the action giving rise to the strike.[5]

The district court also relied in part upon the union's stated policy that it "will do what it has to do" to protect its members. That policy is simply a statement that the union will do its duty toward its members; it does not support a conclusion that the union planned to engage in unlawful activity in the future.

The district court developed an insufficient record concerning whether the union acted in good faith in undertaking the job actions in the prior suits between the union and a carrier. The summary judgment record developed before the district court does not support its conclusion that

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[4] *Brotherhood of Maintenance of Way Employees v. Atchison, Topeka & Santa Fe Ry. Co.*, 1996 U.S. Dist. LEXIS 21132, No. 96-1515, 96-1524, (C.D. Ill. December 17, 1996, reversed on appeal 138 F.3d 635 (7th Cir. 1998); *Brotherhood of Maintenance of Way Employees v. Union Pacific Railroad Co.*, No. 00-2-396 (D. Colo. 2000), reversed *2000 U.S. App. LEXIS 33454*, No. 00-1105 (10th Cir. December 21, 2000).

[5] *CSX Transp., Inc. v. Brotherhood of Maintenance of Way Employees*, No. 95-813 (M.D. Fla. August 28, 1995); *Norfolk Southern Ry. Co. v. Brotherhood of Maintenance of Way Employees*, (W.D. Va.. November 8, 1996); *Consolidated Rail Corp. v. Brotherhood of Maintenance of Way Employees*, No. 98-CV-4277 (E.D. Pa. August 14, 1998).

the union has demonstrated a pattern, practice, and policy of illegally engaging in self-help activities.

The foregoing analysis of the district court's decision to issue an injunction on summary judgment is not intended to weaken the conclusion that the injunction sought by appellees should not issue in any event.

I would reverse the summary judgment entered by the district court and remand to the district court for further proceedings not inconsistent herewith.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS,
FORT WORTH DIVISION

No. 4:00-CV-0441-A

BURLINGTON NORTHERN and SANTA FE RAILWAY CO., *et al.*,
Plaintiffs,

vs.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Defendant.

April 12, 2001, Decided
April 12, 2001, Filed

JUDGES: JOHN McBRYDE, *United States District Judge.*

OPINION

MEMORANDUM OPINION and ORDER

Now pending are the motion of plaintiffs, Burlington Northern and Santa Fe Railway Company ("BNSF"), Consolidated Rail Corporation ("Conrail"), CSX Transportation, Inc. ("CSX"), Kansas City Southern Railway Company ("KCS"), Norfolk Southern Railway Company ("NS"), and Union Pacific Railroad Company ("UP"), for summary judgment on their claims for declaratory and injunctive relief, the motion of defendant, Brotherhood of Maintenance of Way Employees, ("BMWE") for summary judgment, and plaintiffs' motion for summary judgment on BMWE's counterclaim.

The court, having considered the motions,[1] the responses, the record, the summary judgment evidence, and applicable authorities, makes the following determinations.

I.

Plaintiffs' Claims

On May 23, 2000, plaintiffs filed their complaint for declaratory and injunctive relief in which they allege that:

> Plaintiffs are common carriers by rail under the Interstate Commerce Act and carriers as defined in § 1 First of the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. §§ 151-88 ("RLA"). They are represented by the National Carriers' Conference Committee ("NCCC") for purposes of national collective bargaining agreement issues. BMWE is an unincorporated association and a labor organization as defined in the RLA that is the collective bargaining representative under the RLA of the craft or class of maintenance of way employees employed by plaintiffs.[2] BMWE has pursued, and continues to pursue, a policy or practice of striking over minor disputes by characterizing any action of plaintiffs with which it disagrees as a "unilateral change." The union's pattern, policy, or practice of striking constitutes a violation of its statutory obligation to exert every reasonable effort to settle disputes without interruption of railroad transportation as set forth in 45 U.S.C. § 152 First.

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[1] Plaintiffs' motions are titled motions for partial summary judgment only because they address their claims and defendant's counterclaim in separate motions.

[2] The allegations described in this sentence and in the two sentences immediately preceding it are admitted by defendant in its answer. Thus, they state undisputed facts for summary judgment purposes.

Plaintiffs pray for declaratory judgment that (1) BMWE's authorizing, encouraging, permitting, calling, or engaging in strikes, work stoppages, picketing, or other self-help against plaintiffs and their subsidiaries over any disputes involving what BMWE claims are unilateral changes in agreements, without prior notice to plaintiffs, is a violation of § 152 First, and (2) BMWE's pattern, practice or policy of engaging in conduct of that kind is a violation of § 152 First. Plaintiffs seek an injunction requiring BMWE, its divisions, lodges, locals, officers, agents, employees, members, and all persons acting in concert or participation with any of them, to provide at least ten days' notice to plaintiffs prior to engaging in the described conduct during the period prior to exhaustion of the major dispute procedures.

II.

BMWE's Answer and Counterclaim

BMWE takes the position that plaintiffs' complaint fails to state a claim upon which relief can be granted, and specifically alleges that the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §§ 101-15, ("NLGA") prevents the court from granting the relief sought by plaintiffs and that § 152 First does not apply to disputes other than those over the conduct of bargaining. In the alternative, BMWE counterclaims against plaintiffs for a declaration that plaintiffs violate § 152 First by a policy and practice of asserting that disputes must be arbitrated while plaintiffs continue to act in accordance with their contract interpretations that they claim require arbitration, and continue to act in accordance with their contract interpretations even after they have been rejected in arbitration.

III.

The Motions for Summary Judgment

Plaintiffs moved January 31, 2001, for summary judgment, contending that the summary judgment record establishes as a

matter of law their right to the relief they seek by their complaint. In addition, plaintiffs filed a motion for summary judgment as to BMWE's counterclaim, asserting, in effect, that there is no summary judgment evidence to support the assertion by BMWE that plaintiffs have violated § 152 First "as a result of their handling of disputes with the BMWE, either pending or following arbitration." Carriers' Mot. for Partial Summ. J. on BMWE's Countercl. at 1-2.

BMWE has moved for summary judgment as to plaintiffs' request for declaratory and injunctive relief, assigning as grounds of its motion that (1) "the Court lacks jurisdiction over [plaintiffs'] complaint since it does not involve an actual case or controversy as required by Article III of the Constitution," (2) "[§ 152] First does not provide a basis for the claims asserted by [plaintiffs]," and (3) "the injunctive relief [plaintiffs] seek is barred by the Norris LaGuardia Act." Def.'s Mot. for Summ. J. or Alternatively for Dismissal Pursuant to 12(B)(1) at 2.

IV.

The Legal Context

Before discussing the undisputed summary judgment evidence, the court provides a legal context by discussions of the purpose and scheme of the RLA, and the distinctions between minor and major disputes.

A. The Purpose and Scheme of the Railway Labor Act:

The core dispute resolution duties imposed by the RLA on carriers and their employees are defined at 45 U.S.C. § 152 First and Second as follows:

> First. Duty of carriers and employees to settle disputes
>
> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes,

> whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.
>
> Second. Consideration of disputes by representatives
>
> All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Consistent with those provisions is the description of the purpose and scheme of the RLA found in *Delaware & Hudson Railway Co. v. United Transportation Union* as follows:

> The purpose and scheme of the Railway Labor Act is to "provide a machinery to prevent strikes" and the resulting interruptions of interstate commerce. As to minor disputes the Act provides for compulsory arbitration. As to major disputes, . . . the Act's machinery operates not to prohibit strikes but to delay them in order to assure ample opportunity for negotiation and mediation.

146 U.S. App. D.C. 142, 450 F.2d 603, 607 (D.C. Cir. 1971) (footnote omitted).

Two of the questions presented to the Supreme Court in *Chicago & North Western Railway Co. v. United Transportation Union* were "whether [45 U.S.C. § 152] First imposes a legal obligation on carriers and employees or is a mere exhortation" and "whether the obligation is enforceable by the judiciary." 402 U.S. 570, 574, 91 S. Ct. 1731, 29 L. Ed. 2d 187 (1971). After recalling its observation in an earlier

case that the heart of the RLA is the duty imposed by § 152 First, the Court said:

> We think it plain that § [152] First was intended to be more than a mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis.

Id. at 577. And, the Court added, "We think the conclusion inescapable that Congress intended the enforcement of § [152] First to be overseen by appropriate judicial means. . . ." *Id.* at 581. Section 152 Second and the other provisions of the RLA serve to define congressionally mandated techniques for the accomplishment of the goal of § 152 First.

B. "Major" versus "Minor" Disputes:

A distinction exists between changes in working conditions that are "major" changes and those that are "minor." In *Elgin, Joliet & Eastern Railway Co. v. Burley*, the Supreme Court explained the difference between disputes concerning the making of collective agreements ("major disputes") and those over grievances ("minor disputes"), saying:

> The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper

> application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

325 U.S. 711, 723, 65 S. Ct. 1282, 89 L. Ed. 1886 (1945).

More recently, the Court restated the test in determining the difference between major and minor disputes by explaining:

> Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major.

Consol. Rail Corp. v. Ry. Labor Executives' Ass'n, 491 U.S. 299, 307, 105 L. Ed. 2d 250, 109 S. Ct. 2477 (1989).

The RLA provides a method of resolution of minor disputes if agreement cannot otherwise be reached, mandating in 45 U.S.C. § 153 First (i) that:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the

> appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

This dispute resolution procedure is compulsory. *Bhd. of R.R. Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 33-39, 1 L. Ed. 2d 622, 77 S. Ct. 635 (1957). See *Bhd. of Locomotive Eng'rs v. Missouri-Kansas-Texas Ry. Co.*, 363 U.S. 528, 531, 4 L. Ed. 2d 1379, 80 S. Ct. 1326 (1960) ("The superseding purpose of the Railway Labor Act [is] to establish a system of compulsory arbitration for [minor disputes], a purpose which might be frustrated if strikes could not be enjoined during the consideration of such a dispute by the [National Railroad Adjustment] Board."); *Burlington N.R.R. v. BMWE*, 961 F.2d 86, 89 (5th Cir. 1992) ("Section 153 First (i) mandates compulsory arbitration to resolve minor disputes."). "Any strike or other self-help by the BMWE against the Railroads over [minor] disputes would be unlawful under the RLA." *BMWE v. Atchison, Topeka & Santa Fe Ry. Co.*, 840 F. Supp. 1221, 1236 (N.D. Ill. 1993). The courts have the responsibility to enforce the mandatory compulsory arbitration obligation because "when an illegal strike occurs over a minor dispute, the employees or the union have violated not only § 152 First but also § 153 First (i)." *Burlington N.R.R.*, 961 F.2d at 89.

The procedures to be followed in the event of a major dispute were described in Consolidated Rail Corp. as follows:

> The statutory bases for the major dispute category are § 2 Seventh and § 6 of the RLA, 48 Stat. 1188, 1197, 45 U.S.C. § 152 Seventh and § 156. The former states that no carrier "shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements" or through the mediation procedures established in § 6. This statutory category
>
> "relates to disputes over the formation of collective agreements or efforts to secure them. They arise where

> there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." *Burley*, 325 U.S. at 723.
>
> In the event of a major dispute, the RLA requires the parties to undergo a lengthy process of bargaining and mediation. §§ 5 and 6. Until they have exhausted those procedures, the parties are obligated to maintain the status quo, and the employer may not implement the contested change in rates of pay, rules, or working conditions. . . . Once this protracted process ends and no agreement has been reached, the parties may resort to the use of economic force.

491 U.S. at 302-03 (footnote omitted).

A significant difference between the practices related to major and minor disputes is that neither side can unilaterally implement a policy or program that is the subject of a major dispute, while the subject of a minor dispute can be implemented pending arbitration. See *Consol. Rail Corp.*, 491 U.S. at 304; *Int'l Bhd. of Teamsters v. Southwest Airlines*, Inc., 875 F.2d 1129, 1133 (5th Cir. 1989) (en banc). Accordingly, the characterization of the dispute as major or minor is often a threshold issue in litigation between a railroad and a union.

In the case of a major dispute, "the parties are obligated to refrain from self help while the Act's procedures are being pursued." *Delaware & Hudson Ry. Co.*, 450 F.2d at 607. If self help is prematurely sought, injunctive relief can be granted. *Consol. Rail. Corp.*, 491 U.S. at 303.

V.

Undisputed Summary Judgment Evidence

The following evidence pertinent to the rulings being made on the pending motions is undisputed in the summary judgment record:

> Throughout history, relations between railroads and their workers have often been stormy. As another judge noted, "the origins of this matter (as well as many other disputes) can probably be traced back prior to 1894, when Eugene V. Debs led members of the American Railway Union in a turbulent strike against the Pullman Palace Car Company of Illinois." *Alton & Southern Ry. Co. v. BMWE*, 883 F. Supp. 755, 756 (D.D.C. 1995). More recently, relations were strained at the conclusion of the 1988 round of collective bargaining between the parties. BMWE and several other unions were unable to reach agreements with the carriers. Consequently, President Bush created Presidential Emergency Board 219 ("PEB 219") to investigate and report on the disputes. PEB 219 issued a report containing a series of recommendations that made BMWE "very, very upset." Carriers' App. at 144. Although other unions reached settlements, BMWE instituted a strike on April 17, 1991. The following day, Congress stepped in to end the strike by enacting Public Law No. 102-29, 105 Stat. 169 (1991). As a result, BMWE was forced to enter into an imposed agreement with the carriers. BMWE responded with a mailing titled "We've Been Worked Over On the Railroad," warning: "Since management and the federal government are not taking our concerns seriously, we have no choice but to consider work stoppages"; and "we want to let shippers and the public know that railroaders are fed up with these conditions—and the result could be a disruption in rail services." Carriers' App. at 146-47. The mailing also stated that BMWE

"wanted the railroads to stop imposing their own interpretations of PEB 219 on us." *Id.* at 146.

The imposed agreement allowed for reopening negotiations in November 1994. Once again, the parties were unable to reach agreement. Consequently, President Clinton appointed Presidential Emergency Board 229 ("PEB 229"), which issued its report in June 1996. *BMWE v. Atchison, Topeka & Santa Fe Ry. Co.*, 138 F.3d 635, 639 (7th Cir. 1997). This time, the railroads and BMWE averted a strike by accepting the pertinent recommendations of PEB 229 and entering into a new national agreement (the "1996 national agreement"). Still, unrest continues. The pace of strikes has accelerated since November of 1999 when the parties entered into a new round of collective bargaining over proposed changes in existing agreements.

Since the summer of 1993, BMWE has struck, attempted to strike, or threatened to strike plaintiffs at least eighteen times, including nine cases in which pickets went up and/or operations were disrupted until the affected plaintiff was able to obtain a temporary restraining order.[3] In the last year, BMWE has accelerated its practice of strikes against plaintiffs, with four incidents since February 2000. In each case, BMWE planned its strike in secret and made every effort to implement the strike before the affected carrier could obtain a temporary restraining order.

In 1993, Conrail filed suit against BMWE in the United States District Court for the Eastern District of Pennsylvania. *Consol. Rail Corp. v. BMWE*, 847 F. Supp. 1294 (E.D. Pa. 1994). It sought a permanent injunction preventing a

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[3] The court accepts plaintiffs' characterization of a situation as a threat to strike if BMWE refused to provide assurances that it would not strike. The summary judgment evidence establishes that, whether BMWE has made a strike decision or not, BMWE's position is, and has historically been, that it "will do what it has to do" to protect its members.

threatened strike by BMWE and a declaration that, under the provisions of the RLA, BMWE was prohibited from striking over issues that were "minor disputes." In support of its request for injunctive relief, Conrail relied on a memorandum circulated by the general chairman of two of BMWE's local federations seeking authority to conduct a strike over eleven potential strike issues. *Id.* at 1298. The memorandum recognized that:

> . . . even during a short strike or threatened strike, Conrail stands to lose substantial revenue. In addition, customers who have alternatives to ship other than rail, often will not deal with a railroad that has labor problems. This by itself puts tremendous pressure on management to resolve disputes rather than face continued unrest from the membership.

Id. at 1300.[4] However, Conrail could not point to any action taken by BMWE to follow up on its strike authorization letter. And, BMWE presented testimony that it was not threatening a strike against Conrail. *Id.* at 1303. The district court denied the relief sought. *Id.* at 1307. Less than two months later, on May 20, 1994, Conrail sought and obtained a temporary restraining order halting a strike because the disputes between Conrail and BMWE were disputes under the Federal Railroad Safety Act, all of which were subject to resolution exclusively by the National Railroad Adjustment Board or other board of adjustment created pursuant to § 3 of the *RLA*. *Consol. Rail Corp. v. BMWE*, No. 94-3124, slip op. (E.D. Pa. May 20, 1994).

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[4] This memorandum, which is part of the summary judgment evidence, also makes the statement that "even the pressure that comes from a strike that is halted by a Federal Judge is sometimes useful in leading to a resolution of the dispute in question," which is immediately followed by the statement, "this is because even during a short strike or a threatened strike, Conrail stands to lose substantial revenue." Carriers' App. at 173.

In 1993, BMWE commenced an action in the United States District Court for the Northern District of Illinois, Eastern Division, seeking a declaratory judgment to resolve a dispute over the proper interpretation of Public Law 102-29. *BMWE v. Atchison, Topeka & Santa Fe Ry. Co.*, 840 F. Supp. 1221 (N.D. Ill. 1993). The defendant railroads in that action filed a counterclaim seeking, among other things, a declaratory judgment that a threatened strike was over minor disputes and, therefore, unlawful. The court found that the plain language of the statute at issue supported the railroads' interpretation. *Id.* at 1229. Because the court found that there was an imminent threat of strike, it granted the injunctive relief sought by the railroads. *Id.* at 1236.

Also in 1993, a predecessor of BNSF filed a complaint in the United States District Court for the Northern District of Illinois, Eastern Division, seeking injunctive relief to prevent BMWE from striking over refusal to pay away-from-home allowances. *Burlington N.R.R. v. BMWE*, No. 93 C 6019, *slip op.* (N.D. Ill. Oct. 22, 1993). The court found that the dispute between the parties was minor and granted a permanent injunction. The parties agreed that it would be in their best interests to resolve the dispute in an expedited manner. Therefore, the court ordered expedited arbitration as a condition of the strike injunction. *Id.* at 22-23.

In 1994, a predecessor of BNSF sought and obtained a temporary restraining order in the United States District Court for the Northern District of Illinois, Eastern Division, to restrain BMWE from striking over the plaintiff's decision to implement special workweeks and/or special starting times on certain projects. *Atchison, Topeka & Santa Fe Ry. Co. v. BMWE*, No. 94 C 2765, slip op. (N.D. Ill. May 4, 1994). The court found that BMWE's protest at most gave rise to a minor dispute. *Id.* at 2. The court later ordered the parties to settle the matter on an expedited basis. *Id.*, Tr. of May 16, 1994, hr'g. The parties thereafter filed a stipulation of dismissal.

In 1994, a group of twenty-nine rail carriers filed suit in the United States District Court for the District of Columbia seeking a declaratory judgment that BMWE was obligated to bargain on a national-handling basis with a multi-employer bargaining representative, and an injunction ordering BMWE to bargain on such basis. *Alton & S. Ry. Co. v. BMWE*, 883 F. Supp. 755 (D.D.C. 1995). On March 17, 1995, they filed a motion for preliminary injunction seeking to enjoin BMWE from engaging in a strike or any other form of self-help because the parties had not yet exhausted their remedies under the RLA. *Id.* at 758. The parties stipulated that a strike was imminent and that irreparable injury would occur if the BMWE were to strike against one or more of the carriers. *Id.* at 764. Because of the high risk of imminent irreparable injury, the court found that injunctive relief would be appropriate even if the carriers' likelihood of success on the merits were quite slim. The court further found that because the RLA's long and drawn-out procedures had only just begun, any attempt by the BMWE to alter the status quo by exercising self-help would be quite premature, would cause irreparable harm, and would be contrary to the public interest. Accordingly, the court granted the request for preliminary injunction. *Id.* at 765.

Later that year, BMWE violated the injunction by picketing Conrail. The court found that BMWE's argument that the preliminary injunction did not apply to its picketing was dependent on either a mischaracterization of what BMWE was doing or a misunderstanding of what the court's previous opinion said. The court ordered BMWE to cease and desist from its picketing. *Alton & S. Ry. Co. v. BMWE*, No. 94-2365 (TFH), *slip op.* (D.D.C. Dec. 15, 1995).

In August 1995, CSX filed a verified complaint and motion for preliminary injunction in the United States District Court for the *Middle District of Florida, Jacksonville Division. CSX Transp., Inc. v. BMWE*, No. 95-813 CIV-J-16 (M.D. Fla.

1995). The court issued a preliminary injunction restraining BMWE from striking or engaging in any related activities. The court found that CSX had shown that the existing work stoppage or strike was over a minor dispute and could be resolved based upon an interpretation of the existing collective bargaining agreement in the light of past practices of the parties in interpreting and applying that agreement.

In December 1995, CSX and BMWE again appeared in the United States District Court for the Middle District of Florida, Jacksonville Division, this time in Case No. 95-957 CIV-J-10. The dispute concerned certain production gang agreements. The parties were currently in mediation and the court found that the agreement in dispute remained in effect as part of the status quo. The court found BMWE's arguments justifying its actions to be frivolous. Thus, the court granted the relief sought by CSX. *CSX Transp., Inc. v. BMWE*, No. 95-957 CIV-J-10, slip op. (M.D. Fla. Dec. 20, 1995).

In November 1996, NS received information that BMWE would strike over travel time and tenure protection. The United States District Court for the Western District of Virginia, Roanoke Division, granted a temporary restraining order. *Norfolk S. Ry. Co. v. BMWE*, slip op. (W.D. Va. Nov. 8, 1996).[5] The case was then transferred to the United States District Court for the Central District of Illinois, where it was consolidated with another pending action. The question before the court was whether the carriers' position that a provision regarding travel payments applied only to regional and system gang employees was a major or minor dispute under the RLA. *BMWE v. Atchison, Topeka & Santa Fe Ry. Co.*, 1996 U.S. Dist. LEXIS 21132, Nos. 96-1515 and 96-1524, 1996 U.S. Dist. LEXIS 21132 (C.D. Ill. Dec. 17,

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[5] A copy of the order is found at Carriers' App. at 368. It does not include reference to a civil action number.

1996). The court found that the dispute was a major one, but granted a strike injunction pending an appeal. The Seventh Circuit thereafter reversed the decision of the trial court, finding that the dispute was minor. *BMWE v. Atchison, Topeka & Santa Fe Ry. Co.*, 138 F.3d 635 (7th Cir. 1997). In accordance with the mandate, the district court then granted a permanent injunction against strikes over that dispute. *BMWE v. Atchison, Topeka & Santa Fe Ry. Co.*, 1998 U.S. Dist. LEXIS 23214, Nos. 96-1515 & 96-1524, slip op. (C.D. Ill. May 19, 1998).

On June 17, 1997, the United States District Court for the District of Colorado granted a similar injunction preventing BMWE from striking over the application of Article XIV of the parties' September 26, 1996, collective bargaining agreement, finding that such a strike was over a minor dispute. *Alton & S. Ry. Co. v. BMWE*, No. 97-B-738, slip op. (D. Colo. June 17, 1997).

In November 1997, United States District Court for the Northern District of Illinois, Eastern Division, granted a preliminary injunction in favor of Conrail in joining a threatened strike by BMWE over a minor dispute. *BMWE v. Consol. Rail Corp.*, No. 97-C-2016, slip op. (N.D. Ill. Nov. 21, 1997). In 1998, the court granted a permanent injunction on the same matter. *BMWE v. Consol. Rail Corp.*, No. 97-C-2016, slip op. (N.D. Ill. 1998). BMWE's appeal of the order was dismissed. Carriers' App. at 438.

On May 12, 1998, BNSF sought and obtained a temporary restraining order restraining BMWE from striking and picketing any of BNSF's facilities. *Burlington N. & Santa Fe Ry. Co. v. BMWE*, No. 3:98-CV-0887-T, slip op. (N.D. Tex. May 12, 1998). Thereafter, on June 2, 1998, the court granted BNSF's application for preliminary injunction. *Burlington N. & Santa Fe Ry. Co. v. BMWE*, No. 3:98-CV-0887-T, slip op. (N.D. Tex. June 2, 1998). The court found that the dispute between the parties, confined to BNSF's assignment or denial

of seniority to particular positions or persons when the seniority dispute concerned the application of certain rules, was a minor dispute under the RLA. The court granted BMWE's motion to dismiss BNSF's request for damages, finding that it was barred by collateral estoppel. The court refused, however, to dismiss BNSF's request for a prospective injunction to require BMWE to give notice before striking. *Burlington N. & Santa Fe Ry. Co. v. BMWE*, 1998 U.S. Dist. LEXIS 22879, No. 3:98-CV-0887-T, slip op. (N.D. Tex. Oct. 26, 1998).

In discovery undertaken in the above-described action, David Joynt, General Chairman for the Burlington System Division of the BMWE, testified that a strike ballot taken in May 1995 approving a strike in the event the BNSF were to make a unilateral change in the application of its agreement with BMWE authorized a May 1998 strike. Further, the term "unilateral change" told Joynt that a major dispute was involved and "of course, under the Railway Labor Act, my knowledge of it, it's a major dispute when a carrier changes the application, and we have the right to respond by self-help." Carriers' App. at 465.

The court granted BNSF's motion for a permanent injunction against striking over the issue raised in that dispute. *Burlington N. & Santa Fe Ry. Co. v. BMWE*, 93 F. Supp. 2d 751 (N.D. Tex. 2000). As for the request for a permanent injunction mandating three days' notice of future strikes, the court stated:

> The court recognizes and is not unsympathetic to the fact that BNSF has sustained substantial losses from BMWE's strikes over minor disputes, even when, as here, the strike was promptly enjoined. The Court further recognizes that under binding Fifth Circuit precedent which prohibits monetary damages for violation of the RLA, *Burlington N. R.R. Co. v. BMWE*, 961 F.2d 86, 88-89 (5th Cir. 1992), a rail carrier is without a remedy for

> the damage it sustains when a union deliberately strikes over a minor dispute and takes steps to keep the strike secret so that the carrier cannot obtain a temporary restraining order until the damage has been done. The summary judgment evidence shows that BMWE is at least aware of this "loophole" in the law, and its potential for exploitation to BMWE's advantage. The Court's holding that BNSF is not entitled to an advance notice injunction against BMWE on the record before the Court in no way precludes BNSF from obtaining such an injunction against BMWE in the future, if BNSF can make the requisite factual showing at that time.

93 F. Supp. 2d at 759-60.

In August 1998, the United States District Court for the Eastern District of Pennsylvania issued a temporary restraining order restraining BMWE from striking Conrail. *Consol. Rail Corp. v. BMWE*, No. 98-CV-4277, slip op. (E.D. Pa. Aug. 14, 1998). According to the UTU Daily News Digest, the parties agreed to extend the injunction until the completion of certain track work in Marysville, Ohio. Carriers' App. at 490. "The strike, which caught Conrail by surprise, left rail yards around the Northeast and Midwest quiet. Most of Conrail's 16,000 other workers honored the strike, leaving freight shipments stuck in stations and disrupting passenger service on rail lines sharing track with Conrail." *Id.*

In November 1999, UP announced that it was changing its policy for acquiring switch panels and track panels and that it would be closing its Laramie, Wyoming, panel plant. BMWE notified UP that it considered the changes to be a major dispute under the RLA. BMWE filed a lawsuit in the District of Colorado and commenced a strike. UP filed its own action in Nebraska, alleging that the BMWE had called an illegal strike over a minor dispute. The Nebraska judge agreed and issued an order temporarily enjoining BMWE from continuing its strike. The court then transferred the action to

Colorado, where the BMWE's action was already pending. Carriers' App. at 494. The Colorado district court disagreed with the Nebraska court's conclusion that the dispute was minor. It issued an order granting BMWE's motion for preliminary injunction enjoining UP from going forward with its plans. *BMWE v. Union Pac. R.R.*, No. 00-Z-396, *slip op.* (D. Colo. Mar. 9, 2000). On appeal, the United States Court of Appeals for the Tenth Circuit reversed. *BMWE v. Union Pac. R.R.*, 2000 U.S. App. LEXIS 33454, No. 00-1105 (10th Cir. Dec. 21, 2000). The Tenth Circuit found that, because the dispute at issue could be resolved by application and interpretation of the existing collective bargaining agreement, it was a minor dispute. A BMWE news release following the ruling by the Colorado district court quoted officials as stating that BMWE would strike again under similar circumstances. In particular, "when any railroad decides to blatantly act against the clear language of our contracts after repeated requests to cease their illegal acts, BMWE will act in the best interests of our members." Carriers' App. at 501.

In March 2000, CSX filed suit in the United States District Court for the Middle District of Florida seeking to enjoin a strike over contracting out of maintenance of way work. *CSX Transp., Inc. v. BMWE*, No. 3:00-CV-237-J-20A (M.D. Fla. 2000). The court granted a temporary restraining order finding that the disputes between the parties were minor, because they could be resolved based on an interpretation of existing collective bargaining agreements. The court further found that a work stoppage by BMWE and its failure to provide advance notice of such a work stoppage violated § 2 First of the RLA. *Id.*, *slip op.* at 4 (M.D. Fla. March 9, 2000). In response, BMWE issued a news release stating in pertinent part:

> As a result of the CSXT purchase of 40 percent of Conrail in June 1999, the BMWE and CSXT entered into a new collective bargaining agreement to integrate

> the newly acquired property into CSXT operations. The agreement was explicitly designed to reserve BMWE work to BMWE members and to eliminate the sub-contracting of most bargaining unit work.
>
> Shortly after signing the agreement with BMWE, CSXT began to regularly sub-contract core bargaining unit work in the form of routine maintenance and regular programmed repairs such as renewals and rehabilitation of tracks, roadbed and structures. CSXT has acted as if the new agreement provision reserving work to the BMWE members does not exist. Despite repeated meetings with the BMWE, CSXT has done nothing to halt their unilateral change of the collective bargaining agreement in effect between BMWE and CSXT. There is no question that the agreement in effect between BMWE and CSXT does not permit the avalanche of sub-contracting done by CSXT.
>
> . . . .
>
> Management knows full well that our agreement does not permit the sub-contracting of this work. . . .
>
> Carriers' App. at 514-15. After an evidentiary hearing, the court granted CSX a preliminary injunction and directed the parties to enter into arbitration as provided by the RLA. *CSX Transp., Inc. v. BMWE*, No. 3:00-CV-237-J-21A consolidated with No. 3:00-CV-264-21B, *slip op.* (M.D. Fla. March 24, 2000).

On May 4, 2000, BMWE issued a news release describing a strike against NS. The reason for the strike was described as follows:

> Management unilaterally abrogated the bulletin and assignment rules in the collective bargaining agreement between the former N & W property and BMWE. The collective bargaining agreement contains provisions

> which expressly state that all vacancies and positions be announced by "bulletins" containing specified information, that employees may "bid" for such positions, and that such positions must be filled in accordance with the seniority of bidders as specified in the collective bargaining agreement.

Carriers' App. at 530. NS filed suit in the United States District Court for the Western District of Virginia and obtained a temporary restraining order. *Norfolk S. Ry. Co. v. BMWE*, No. 98-0377-R, *slip op.* (W.D. Va. May 4, 2000). Among other things, the court found that:

> 6. Defendant BMWE was dismissed from a prior civil action in this Court (Civil Action No. 97-740-R) based on the commitments of defendants BMWE and Fleming, in a settlement agreement with the plaintiffs, that, among other things, "BMWE will not strike in response to the implementation of the [Conrail] transaction by the railroads pursuant to the [Surface Transportation] Board's authorization."

Id. at 2. Thereafter, the temporary restraining order was converted into a preliminary injunction. *Norfolk S. Ry. Co. v. BMWE*, No. 98-0377-R, slip op. (W.D. Va. May 12, 2000).

Most recently, BMWE struck plaintiff KCS over a dispute involving subcontracting. In that case, KCS officials heard about the strike (which was planned in secret and scheduled to begin at 5:00 a.m. on Monday, January 22, 2001) on Sunday afternoon, January 21, 2001. KCS was able to obtain a temporary restraining order from the United States District Court for the Western District of Louisiana, Shreveport Division, at 9:00 p.m. that night. *Kansas City S. Ry. Co. v. BMWE*, No. CV01-0125-S, slip op. (W.D. La. Jan. 21, 2001). However, notice of the last-minute injunction did not reach everyone in time, and pickets appeared at four locations on the KCS system. The case was tried on February 21, 2001.

Judge Stagg made his findings of fact and conclusions of law during a telephone conference with counsel the following day. *Id.*, tr. of 2-22-01 hearing. He found, in pertinent part:

> Despite statutory and contractual restraints, the Union instituted a system-wide strike against KCS without warning. This is in clear violation of at least two provisions of the RLA: Section 152, first and second, requiring a carrier and union to attempt a voluntary good faith settlement of all disputes; and second, Section 153, establishing the exclusive jurisdiction of the National Railway Adjustment Board over minor disputes.

Id. at 13. The court permanently enjoined BMWE from calling or continuing any strike against KCS in connection with the matters before the court. *Id.* at 13-14.

Strikes are intended to interfere, and do interfere, with interstate commerce. The shutdown of rail service interferes with transportation of supplies essential to the public, such as U.S. mail, food, fuel, and military equipment, as well as with commuter and passenger rail operations. In addition to suffering immediate, substantial revenue loss, carriers face long-term loss of customers as a result of strikes by BMWE.

Other reasonable inferences to be drawn from the undisputed evidence are discussed at later points in the Memorandum Opinion and Order.

VI.

Summary Judgment Burdens

A party is entitled to summary judgment on all or any part of a claim as to which there is no genuine issue of material fact and as to which the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The moving party has the initial burden of showing that there is no genuine issue of material fact.

Anderson, 477 U.S. at 256. The movant may discharge this burden by pointing out the absence of evidence to support one or more essential elements of the non-moving party's claim "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Once the moving party has carried its burden under Rule 56(c), the non-moving party must do more than merely show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

The party opposing the motion may not rest on mere allegations or denials of pleading, but must set forth specific facts showing a genuine issue for trial. *Anderson*, 477 U.S. at 248, 256. To meet this burden, the nonmovant must "identify specific evidence in the record and articulate the 'precise manner' in which that evidence support[s] [its] claim[s]." *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994). An issue is material only if its resolution could affect the outcome of the action. *Anderson*, 477 U.S. at 248. Unsupported allegations, conclusory in nature, are insufficient to defeat a proper motion for summary judgment. *Simmons v. Lyons*, 746 F.2d 265, 269 (5th Cir. 1984). Nor will debates over the consequences flowing from undisputed facts prevent summary judgment. *Burlington N. & Santa Fe Ry. Co. v. BMWE*, 93 F. Supp. 2d at 756.

The standard for granting a summary judgment is the same as the standard for a directed verdict. *Celotex Corp.*, 477 U.S. at 323. If the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita*, 475 U.S. at 597.

VII.

Other Pertinent Legal Principles

A. The Effect of the Norris-LaGuardia Act

The NLGA "expresses a basic policy against the injunction of activities of labor unions." *International Ass'n of Machinists v. Street*, 367 U.S. 740, 772, 6 L. Ed. 2d 1141, 81 S. Ct. 1784 (1961). BMWE maintains that the injunctive relief sought by plaintiffs is prohibited by the NLGA. On the other hand, plaintiffs assert that, notwithstanding the NLGA, injunctive relief can be granted against a union if necessary to enforce the provisions of the RLA.

In *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad*, the Supreme Court made clear that the provisions of the NLGA do not prevent a court from granting injunctive relief "to vindicate the processes of the Railway Labor Act" and to enforce the procedures the RLA prescribes for resolution of minor disputes. 353 U.S. 30, 40-42, 77 S. Ct. 635, 1 L. Ed. 2d 622. The Court applied a principle it had announced in *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 96 L. Ed. 1283, 72 S. Ct. 1022 (1952), that "the specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act." 353 U.S. at 41-42. The Fifth Circuit has applied the principles expressed in *Chicago River. Missouri-Kansas-Texas R.R. v. Bhd. of R.R. Trainmen*, 342 F.2d 298, 299 (5th Cir. 1965) (holding that, "while the Norris-LaGuardia Act may well operate to deprive a district court of jurisdiction to grant injunctive relief in a 'major' railway labor dispute as to which the procedure prescribed by the Railway Labor Act has been exhausted, it is settled that the Act does not deprive a district court of jurisdiction to enjoin a strike arising out of a 'minor' dispute which is within the jurisdiction of the National Railroad Adjustment Board and which has been submitted to the Board.").

The Court noted in Chicago River that the NLGA might affect a court's ability to grant injunctive relief in the event of a major dispute, 353 U.S. at 42 n.24, but since then the Court has noted that, notwithstanding the NLGA, a strike injunction can be a means of enforcing compliance with mandates of the RLA related to such a dispute, *Burlington N.R.R. v. BMWE*, 481 U.S. 429, 445-46 & n.11, 95 L. Ed. 2d 381, 107 S. Ct. 1841 (1987); *Chicago & N.W. Ry. Co.*, 402 U.S. at 581-83. As the D.C. Circuit explained in Delaware & Hudson Railway Co.:

> The Norris-LaGuardia Act has withdrawn the power of the Federal courts to issue injunctions in labor disputes. That prohibition is subject to an overriding doctrine permitting the issuance of an injunctive order in order to enforce compliance with the requirements of the Railway Labor Act.

450 F.2d at 611 (footnote omitted). *Texas International Airlines, Inc. v. Air Line Pilots* Ass'n is typical of the cases in which an injunction was granted to enforce the provisions of the RLA pending exhaustion of the procedure prescribed by the RLA in the event of a major dispute. 518 F. Supp. 203 (S.D. Tex. 1981). The court in that case reached the following legal conclusions that apply as well to the instant case:

> Under the Railway Labor Act, parties in a major dispute have a statutory duty to fully exhaust statutorily mandated notice and mediation procedures before resorting to self-help measures such as a strike or work slowdown. . . .
>
> Federal Courts may issue injunctions to enjoin compliance with mandates of the Railway Labor Act.
>
> . . . .
>
> . . . The purpose of injunctive relief under the Railway Labor Act is to prevent the parties in a labor dispute from resorting to self-help and disrupting the status quo

> prior to the exhaustion of mandatory mediation efforts. Therefore, the policy of the Railway Labor Act, i.e. to prevent interruptions of common carrier service by prescribing detailed procedures for the peaceful settlement of labor disputes, may be vindicated with a court injunction.
>
> . . . .
>
> . . . It is well settled that injunctions issued to enforce obligations of the Railway Labor Act are to be accommodated with the Norris-LaGuardia Act only to the extent that the policies of the latter are not inconsistent with the policies of the former.
>
> . . . .
>
> . . . [Section] 9 of the Norris-LaGuardia Act (29 U.S.C. § 109) must yield to the Railway Labor Act which authorizes injunctions to avert threatened interference with mandated mediation procedures.

Id. at 215-18 (citations omitted).

Title 29 U.S.C. § 104 enumerates specific acts that cannot be enjoined. But, the power of the federal courts to enjoin a violation of the RLA is "not negatived by or subject to Section 4 of the Norris-LaGuardia Act [29 U.S.C. § 104]." *Bhd. of R.R. Trainmen v. Akron & Barberton Belt R.R.*, 128 U.S. App. D.C. 59, 385 F.2d 581, 613 (D.D.C. 1967). The D.C. Circuit said, "the point is, simply that Congress did contemplate actions to effectuate the Railway Labor Act by enjoining violations" and that "that purpose would be utterly defeated if the federal court actions involved were subject to Section 4 of the Norris-La Guardia Act [29 U.S.C. § 104], which had provisions for withholding injunctions in labor disputes reflecting entirely different objectives." *Id.* at 613-14.

In *Delta Air Lines v. Air Line Pilots Ass'n, International*, 238 F.3d 1300 (11th Cir. 2001), *cert. denied*, 121 S. Ct. 1958, 149 L. Ed. 2d 754, 69 U.S.L.W. 3728 (U.S. 2001), the Eleventh Circuit, after first recognizing the rule that, when a specific provision of the RLA is implicated, the federal courts have jurisdiction and power to issue necessary injunctive orders to enforce compliance with the RLA notwithstanding the provisions of the NLGA, *id.* at 1306, stated that it is clear that § 152 First is just such a provision, explaining:

> It is clear that the substantive legal duty of 45 U.S.C. § 152 First, is a "specific provision" of the RLA and, moreover, is central to the purpose and functioning of the RLA. Therefore, the provision takes precedence over the more general provisions of the NLGA. This is not to say that the procedural standards of the NLGA do not apply, but only that the substance of the RLA is controlling. We therefore hold that when this specific provision of the RLA is implicated and there is no other effective way to enforce the RLA, the NLGA does not prohibit a federal court from issuing an appropriate injunction.

Id. at 1307. And, more to the point as to the instant case, the court said:

> Further, this dispute centers on 45 U.S.C. § 152 First, which imposes a statutory obligation "to exert every reasonable effort to make and maintain agreements." This clear statutory provision is at the heart of the RLA and is clearly within the province of the federal courts to enforce. When the public interest, commerce, and a clear statutory provision are implicated, we will not shy away from holding the parties to their duties under the RLA so as to avoid "any interruption to commerce." 45 U.S.C. § 152 First.

Id. at 1307-08.

However, the Supreme Court, while recognizing the principle that the NLGA does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the RLA, has cautioned that, even when a violation of the RLA has been shown, courts should hesitate to grant an injunction against union activity "unless that remedy alone can effectively guard the plaintiff's right." *Int'l Ass'n of Machinists*, 367 U.S. at 773.

Potential applicability of the NLGA is a subject to which the court will return in the discussion of the proof requirements for a permanent injunction.

B. A Damage Remedy is Not Available to Guard Plaintiffs' Rights

In *Louisville & Nashville Railroad v. Brown*, the Fifth Circuit held that § 152 First does not establish a statutory right of action for damages for a breach of the duty it creates. 252 F.2d 149, 155 (5th Cir. 1958). Similarly, a railroad does not have a right to recover damages by reason of a breach of § 153 First (i). *Burlington N.R.R. v. BMWE*, 961 F.2d 86, 89 (5th Cir. 1992). The law of the Fifth Circuit is now quite clear that a carrier has no cause of action under the RLA for damages caused by an illegal strike due to a minor dispute. *American Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 584 (5th Cir. 2000), *cert denied*, 149 L. Ed. 2d 106, 121 S. Ct. 1190 (2001). The court concludes that under Fifth Circuit law a railroad would have no right to recover damages suffered by it as a result of a union's violation of the RLA whether the violation was related to a major dispute or to a minor dispute.

C. The Proof Requirements For a Permanent Injunction

The prerequisites generally applicable for the grant of a preliminary injunction were enumerated by the Fifth Circuit in Canal Authority of *State of Florida v. Callaway*:

> The four prerequisites are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest.

489 F.2d 567, 572 (5th Cir. 1974). Generally speaking, the standard for a permanent injunction is the same as the standard for a preliminary injunction except that, in the case of the former, the plaintiff must actually succeed on the merits rather than to merely show, as in the case of the latter, a likelihood of success. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n. 12, 94 L. Ed. 2d 542, 107 S. Ct. 1396 (1987).

However, the NLGA has procedural requirements that, generally speaking, must be satisfied before a court of the United States has jurisdiction "to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . .," including requirements that there must first be a hearing in open court for the taking of testimony of witnesses in support of the allegations of the complaint, and testimony in opposition thereto, if offered, and that specified findings of fact be made. 29 U.S.C. § 107. Title 29 U.S.C. § 108 prohibits the granting of a restraining order or injunctive relief "to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation

or with the aid of any available governmental machinery of mediation or voluntary arbitration." Title 29 U.S.C. § 109 provides that:

> No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter.

Plaintiffs' basic position is that none of the provisions of the NLGA is applicable to an action, such as this one, to enforce the RLA; and, they alternatively contend that the open-court hearing requirement of § 107 is inapplicable because the facts are undisputed, that §§ 108 and 109 do not apply, and that the court can find from the undisputed evidence in the summary judgment record the existence of all facts that would have to be found in order to satisfy the fact-finding requirements of § 107. BMWE maintains that all of the provisions of the NLGA apply, and that they prevent the grant of any injunctive relief here.

In *Brotherhood of Railroad Trainmen v. Toledo Peoria & Western Railroad*, the Supreme Court held that § 108 was applicable in that case even though the injunctive relief was being sought to prevent a violation of the *RLA*. 321 U.S. 50, 55-6, 64 S. Ct. 413, 88 L. Ed. 534 (1944). In contrast, in *Virginian Railway Co. v. System Federation No. 40*, Railway Employees Department of the American Federation of Labor, the Court held that § 109 was inapplicable to the injunction at issue in that case, explaining that the provisions of the NLGA

can affect an RLA-related injunction "only so far as its provisions are found not to conflict with [the applicable provisions] of the Railway Labor Act, authorizing the relief which has been granted." 300 U.S. 515, 562-63, 57 S. Ct. 592, 81 L. Ed. 789 (1937).

In Akron & Barberton Belt Railroad, the D.C. Circuit considered the applicability to an RLA injunction action of § 108. After recognizing the Supreme Court's admonition that there must be an accommodation of the NLGA with the RLA, the court explained that the "principle of accommodation means that actions to enjoin violations of the Railway Labor Act may be maintained without regard to Section 4 of the Norris-La Guardia Act [29 U.S.C. § 104], and yet be subject to Section 8 of that Act [29 U.S.C. § 108]." 385 F.2d at 613. Nevertheless, the Court said that in particular cases "the imperatives of the Railway Labor Act override [§ 108] . . ., particularly where it is the public interest involved." *Id.* at 614.

The approach taken by the D.C. Circuit in Akron & Barberton Belt Railroad is not unlike that a district court in D.C. took in *Alton & Southern Railway Co. v. BMWE*, 883 F. Supp. 755, amended, 899 F. Supp. 646 (D.D.C.), *aff'd*, 72 F.3d 919 (D.C. Cir. 1995). As it does in the instant action, in Alton BMWE argued that the NLGA deprived the plaintiff carriers their standing to seek an injunction to prevent violations of the RLA. BMWE apparently conceded that courts may in some instances enjoin violations of the RLA, but argued that § 108 deprived the carriers there of standing to request an injunction because of their failure to comply with their obligation to bargain under the RLA and to make every reasonable effort to settle the dispute that gave rise to the litigation. 883 F. Supp. at 759-60. The court said that an equitable approach could be taken, making an injunction proper "even though one side does not have completely clean hands, especially if there is a strong public interest involved,"

and, "additionally, if it is unclear whether [§ 108] applies, a court may issue a restraining order to avoid jeopardizing the RLA." 883 F. Supp. at 763. In the final analysis, the court applied the factors generally used in the D.C. Circuit for determining whether to grant a request for injunctive relief, *id.* at 764, which are essentially the same as the factors mentioned above as the prerequisites generally applied in the Fifth Circuit.

The parties have cited as Fifth Circuit cases that bear on the issue under discussion *Louisville & Nashville Railroad v. Brown*, 252 F.2d 149 (5th Cir. 1958); *Missouri-Kansas-Texas Railroad v. Brotherhood of Locomotive Eng'rs*, 266 F.2d 335 (5th Cir. 1959), *rev'd on other grounds*, 363 U.S. 528, 4 L. Ed. 2d 1379, 80 S. Ct. 1326 (1960); *Flight Engineers' International Ass'n, AFL-CIO v. American Airlines, Inc.*, 303 F.2d 5 (5th Cir. 1962); and, *Railway Express Agency, Inc. v. Brotherhood of Railway Airline & Steamship Clerks*, 437 F.2d 388 (5th Cir. 1971). In Brown, the Fifth Circuit simply recognized, insofar as the opinion is pertinent to the instant action, that an injunction would lie to prevent the frustration of the dispute resolution procedures mandated by the Railway Labor Act. In Brotherhood of Locomotive Engineers, the union contended that the anti-strike injunction granted the railroad was improper because no testimony of witnesses was heard in open court before the injunction was issued, nor did the district court make any findings of fact, all as contemplated by 29 U.S.C. § 107. In rejecting the union's contentions, the Fifth Circuit noted that the material facts were admitted, and that "under such circumstances the specific provisions of the Railway Labor Act . . . take precedence over the more general provision of the Norris-LaGuardia Act." 266 F.2d at 339. Notwithstanding the noncompliance with § 107, the Fifth Circuit concluded that "the district court had jurisdiction to grant the preliminary injunction against a strike in this labor dispute in order to

protect the primary jurisdiction of the National Railroad Adjustment Board to resolve the dispute." *Id.* at 340. In American Airlines, Inc., the Fifth Circuit said that § 107 should be considered by a court in evaluating whether to grant or deny an injunction to preserve the status quo in an RLA context, explaining:

> Of course, all of this analysis on competing factors inherent in the question to grant or deny a preliminary injunction to preserve the status quo must be read in the light of the Norris-LaGuardia Act, 29 U.S.C.A. § 107. To this extent review by us involves so much of the merits as to determine whether there was a probable substantial basis for concluding that this controversy was outside the pale of that Act.

303 F.2d at 12. The court determined that the dispute at issue there was a minor dispute, and concluded that "it is now clear that despite the literal words of the Norris-LaGuardia Act a Federal Court does have the power—and should exercise it—to enjoin strikes or other actions until the determination of pending controversies by the grievance machinery of the Board of Adjustment" and that there must be an accommodation of the NLGA and the RLA so that the obvious purpose in the enactment of each is preserved. *Id.* The procedures contemplated by § 107 were again the subject of dispute in Railway Express Agency. The union complained that the district court's order permanently enjoining it against further picketing of Railway Express Agency was defective because of the failure of the district court to comply with NLGA prerequisites to granting an injunction, including the § 107 requirement that there be a hearing at which testimony is taken in open court. 437 F.2d at 395. In the course of rejecting that complaint, the Fifth Circuit referred back to its opinion in Brotherhood of Locomotive Engineers, and again held that the injunction granted by the district court was not

imperiled by noncompliance with § 107, noting that there was no dispute as to the crucial facts. *Id.*

Also significant to the § 107 discussion is *Delta Air Lines, Inc. v. Air Line Pilots Ass'n International*, 238 F.3d 1300. The Eleventh Circuit held, as has the Fifth Circuit, that there does not need to be adherence in an RLA injunction case with the open-court hearing feature of § 107 if there is no dispute about the reliability of the evidence, saying that "the purpose of section 107 is served if the evidence is inherently reliable and there is no harm to the parties." *Id.* at 1311.

The court has concluded that a proper accommodation of the NLGA with the RLA in the instant action causes §§ 107, 108, and 109 not to be prerequisites to the relief requested by plaintiffs against BMWE. Nevertheless, for the most part the court is giving effect to the fact-finding requirements of parts (a), (b), (c), and (d) of § 107. Here, the court's summary judgment rulings are being made on the basis of undisputed evidence; and, BMWE has had ample opportunity to present whatever evidence it might wish to adduce in opposition to the evidence plaintiffs have put in the summary judgment record. No claim has been made that the provisions of § 108 could have a bearing on the outcome of this case. As to § 109, this opinion serves as findings of fact made and filed by the court in the record of this case prior to the issuance of an injunction, with the consequence that the fact-finding feature of § 109 would have been satisfied if it were otherwise applicable; and, an argument reasonably could be made that the remaining feature of § 109 also would have been satisfied because the injunctive relief being granted to plaintiffs is basically the same as the injunctive relief sought by the complaint and is the product of the conduct about which plaintiffs complain, which is described in fact-findings contained in this memorandum opinion.

VIII.

Authority Supporting Grant of Prospective Injunctive Relief Requiring Notice

The Supreme Court explained in *United States v. W.T. Grant Co.*, "the court's power to grant injunctive relief survives discontinuance of the illegal conduct" because "the purpose of an injunction is to prevent future violations." 345 U.S. 629, 633, 73 S. Ct. 894, 97 L. Ed. 1303 (1953). The Court continued, "The necessary determination is that there exists some cognizable danger of recurrent violation . . . ." *Id.* In *Shanks v. City of Dallas*, the Fifth Circuit applied the rules expressed in W. T. Grant Co. as being determinative of when permanent equitable relief would be appropriate. 752 F.2d 1092, 1097 (5th Cir. 1985).

A notice injunction similar to the one plaintiffs seek here was sought by BNSF in an action it brought against BMWE in 1998 in the Dallas Division of this court. *Burlington N. & Santa Fe Ry. Co. v. BMWE*, No. 3:98-CV-0887-T (N.D. Tex.). There, BMWE moved to dismiss the complaint for failure to state a claim, urging that such an injunction was prohibited by the provisions of the NLGA, and, as it does in the instant action, citing *United States Steel Corp. v. United Mine Workers of America*, 519 F.2d 1236 (5th Cir. 1975), as Fifth Circuit authority that such an injunction could not be granted. The reasoning of Judge Maloney of the Dallas Division rejecting BMWE's contentions applies as well here:

> The Union does not dispute the Court's ability to issue an injunction to enforce the RLA, but it asserts that the type of injunction requested by Burlington violates section 9 of the NLGA and the Fifth Circuit's holding in *United States Steel Corp. v. United Mine Workers of America*, 519 F.2d 1236 [90 L.R.R.M. 2539] (5th Cir. 1975).

> Section 9 of the NLGA provides that a labor injunction contain "only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court." 29 U.S.C. § 109. In balancing section 9 of the NLGA with the Labor Management Relations Act, the Fifth Circuit, in United States Steel, held that a prospective final injunction against strikes over arbitrable grievances and local trouble of any kind violated the *NLGA*, 519 F.2d at 1245. The court stated, "Such overbroad use of the injunction is the very evil Norris-LaGuardia sought to remedy. *Id.*
>
> However, the Court finds unpersuasive the Union's argument that the Fifth Circuit's decision in United Steel requires dismissal of Burlington's claim. United States Steel involved a prospective final injunction against virtually all strike activity, whereas Burlington's requested injunction would only require notice before a strike. In light of the well-established Supreme Court authority granting district courts the power to issue "necessary injunctive orders" to enforce the RLA, the Court finds that Burlington has stated a valid claim for a prospective injunction. See *Pittsburgh & Lake Erie R.R. Co.*, 491 U.S. [490] at 513, [109 S. Ct. 2584, 105 L. Ed. 2d 415]. Burlington may be able to produce facts justifying the requested injunctive relief.

Burlington N. & Santa Fe Ry. Co. v. BMWE, 1998 U.S. Dist. LEXIS 22879, *13, No. 3:98-CV-0887-T, 1998 WL 1545483, at *4, (N.D. Tex. Oct. 26, 1998). When Judge Maloney decided the case on the merits, he declined to grant the requested notice injunction, but was careful to point out that under a different record such an injunction might well be appropriate. 93 F. Supp. 2d at 759-60.

In Delaware & Hudson Railway, the D.C. Circuit wrote that the obligations of carriers and labor alike under the RLA "to treat with each other through 'responsible conduct of the process of collective bargaining'. . . . is not consistent with such actions as a deliberate timing of a strike without prior warning, with the purpose of enhancing plant damage, or some other garrotte of jungle warfare." 450 F.2d at 622 (quoting *Brh. of R.R. Trainmen v. Akron & B.B.R.R.*, 128 U.S. App. D.C. 59, 385 F.2d 581, 596 (D.D.C. 1967)). In support of a requirement that the union give two weeks advance notice of intent to strike, the D.C. Circuit said:

> We think the continuing duty of responsible bargaining under the [RLA] fairly embraces reasonable notice of a strike or lockout or other self help. In a land conversant with the tradition of two weeks notice for a discharge, that would seem a bench mark for reasonable notice. While a requirement of reasonable notice may be unwelcome to the Union as providing time for counter-measures, it is a limited interference with the protected freedoms that our judgment safeguards, and one that is appropriate in view of the purpose of the Act to achieve resolution of disputes as far as possible through responsible bargaining.

Id. at 622-23.

IX.

The Court Is Denying the Requests for Declaratory Relief

While the declarations sought by plaintiffs are accurate statements of law, and even though the court does not doubt that a justiciable controversy exists, the court has concluded that it should exercise its discretion to decline to grant the declaratory relief sought by plaintiffs. See *Rowan Cos., Inc. v. Griffin*, 876 F.2d 26, 28-29 (5th Cir. 1989).

Steps the court has taken in the process of concluding that injunctive relief should be granted plaintiffs in this action include determinations by the court in favor of plaintiffs that (1) the legal principles plaintiffs are asking the court to declare are meritorious, (2) BMWE has a pattern, practice, and policy of authorizing, encouraging, permitting, calling, or engaging in strikes, work stoppages, picketing, and other self-help against plaintiffs and their subsidiaries over what BMWE claims are unilateral changes in agreements, and (3) 45 U.S.C. § 152 First creates a duty that is violated by BMWE's pattern, practice, and policy. Thus, the court is ruling for plaintiffs on the merits of their claims through the process of deciding that injunctive relief should be granted. Nothing further would be gained by the grant of plaintiffs' requested declaratory relief. As to the declaratory relief sought by BMWE by its counterclaim, the summary judgment record would not support grant of the relief even if it otherwise would be appropriate. Therefore, the court is dismissing all requests for declaratory relief.

X.

Injunctive Relief as Requested by Plaintiffs Should be Granted

The court's first reaction after an initial study of the record and a preliminary review of the legal authorities was that the summary judgment record would support no more than the grant of an injunction requiring BMWE to give notice to the affected carrier-plaintiff before engaging in a strike, or other interference with that carrier's normal operations, over a minor dispute. However, after a more thorough study of the record and a further review of the legal authorities, the court has concluded that a broader notice-injunction should be ordered even if it has the potential to require BMWE to give notice before conducting a strike over a major dispute. The RLA prohibits BMWE from engaging in a strike over a major

dispute before the dispute resolution procedure prescribed by the RLA has been exhausted just as effectively as it prohibits a strike over a minor dispute. A strike in either event would be a direct affront to the purpose and scheme of the RLA.

Plaintiffs' complaint seeks the broader form of injunction by defining the disputes that could lead to the giving of notice as "any disputes involving or concerning what defendant claims is a unilateral change in agreements during the period prior to exhaustion of the major dispute procedures." *Compl.* at 13. Such an injunction will, in the long run, tend to serve judicial economy by having the potential to eliminate recurrent proceedings to determine the nature of the dispute or the genuineness of any asserted belief by BMWE that the dispute is a major one. And, such an injunction is more likely to serve the goal of the RLA "to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." 45 U.S.C. § 152 First.

The court here adopts as fact-findings of the court all statements made in this memorandum opinion and order under the heading "Undisputed Summary Judgment Evidence." The court can, and does, infer from the facts thus found that BMWE has a pattern, practice, and policy of authorizing, encouraging, permitting, calling, or engaging in strikes, work stoppages, picketing, and other self-help against plaintiffs and their subsidiaries over what BMWE claims are unilateral changes in agreements, and that those activities have occurred in the case of minor disputes and before major dispute procedures, if they applied, would be exhausted. That pattern, practice, and policy, and the conduct of BMWE in engaging in activities of that kind without giving the affected carrier advance notice of its intent to do so, all violate BMWE's duties under § 152 First. Not only has BMWE engaged in such a pattern, practice, and policy, and such other conduct, in the past, there is a threat that BMWE will engage

in similar conduct in the future in violation of BMWE's duties under § 152 First and to the detriment of plaintiffs if the court does not grant the requested equitable relief.

Section 152 First must be considered and applied in the context of the provisions of the RLA pertaining to the techniques to be followed in the resolution of major and minor disputes, as the case may be. It imposes a duty on BMWE to refrain from strikes and other forms of self-help in the case of minor disputes "in order to avoid any interruption to commerce or to the operation of any carrier growing out of" such a dispute, and, as to major disputes, to refrain from any such activity prior to exhaustion of the major dispute procedures prescribed by RLA. The strikes and other forms of self-help in which BMWE has engaged in the past, and in which it would probably engage in the future if injunctive relief is not granted, have been in violation of those duties.

Based on the past conduct of BMWE, the court finds that there is a substantial threat that plaintiffs, and each of them, will suffer irreparable injury if a notice-injunction of the kind sought by plaintiffs is not granted. If advance notice of intent to strike is required to be given, plaintiffs will be afforded an opportunity to avoid injury by obtaining injunctive relief before their railroad business is interrupted. Without the requested relief, plaintiffs will continue to be subject to ongoing threats of strikes or other business interferences planned and executed by BMWE in secret, with the object of catching the carriers by surprise, in violation of the RLA.

Because plaintiffs have no recourse against BMWE by way of recovery of damages caused by BMWE's violations of the provisions of the RLA, the requested injunctive relief is an appropriate method of eliminating, or at least reducing, the losses plaintiffs otherwise would suffer by reason of BMWE's violations of the RLA. Plaintiffs already have suffered significant injury from the conduct of BMWE about which they have complained in this action, and probably will

suffer similar injury in the future if the requested injunctive relief is not granted. In contrast, BMWE will not suffer any legally cognizable harm by the grant of the injunctive relief. Consequently, the threatened injury to plaintiffs greatly outweighs any threatened harm the injunction sought by plaintiffs may do to BMWE. The grant of the injunction will not disserve the public interest. Rather, it will further the public interest, as it has been defined by the RLA.

Consistent with the findings previously made, the court finds that BMWE has committed unlawful acts in the form of violations of the RLA, and probably will continue to do so unless restrained; that substantial and irreparable injury to the activities and business of plaintiffs will follow from those unlawful activities unless they are restrained; that greater injury will be inflicted upon plaintiffs if the injunctive relief they seek were to be denied than will be inflicted on BMWE by the granting of the relief; and, that plaintiffs have no adequate remedy at law.

For plaintiffs to have the protections they deserve, the injunctive relief being granted to them should operate against all divisions, lodges, locals, officers, agents, employees, and members of BMWE, as well as all persons acting in concert or participation with BMWE or any of them. A notice period of ten days is appropriate. Such a period will give the affected plaintiff sufficient time to react by seeking judicial relief from the threatened conduct; and, a ten-day period is not so long that it puts BMWE at a significant disadvantage if it genuinely believes under the circumstances that it has the right to engage in the threatened activity.

The court concludes that a grant of the injunctive relief sought by plaintiffs is necessary to vindicate the processes of the RLA. The provisions of the RLA that are vindicated by such an injunction take precedence over any provisions of the NLGA that might be viewed to be offended by the injunctive relief. A notice-injunction of the kind that is being granted

will serve to avert threatened interference with the dispute resolution procedures mandated by the RLA, in the case of both major disputes and minor disputes. The equitable remedy the court is granting to plaintiffs in this action is the least restraint available that can effectively guard the rights of plaintiffs under the RLA and give effect to the purpose of the RLA to achieve resolution of disputes as far as possible through responsible bargaining. The equitable relief being granted to plaintiffs is appropriate in view of the purpose of the RLA.

* * * *

ORDER

Consistent with the foregoing memorandum opinion:

The court ORDERS that the portion of plaintiffs' motion for summary judgment advocating grant of injunctive relief be, and is hereby, granted to the extent such relief is ordered hereby, but is denied as to its request for declaratory relief.

The court further ORDERS that BMWE's motion for summary judgment be, and is hereby, denied.

The court further ORDERS that plaintiffs' motion for summary judgment as to BMWE's counterclaim be, and is hereby, denied as moot.

The court further ORDERS that all requests of plaintiffs and BMWE for declaratory relief be, and are hereby, dismissed.

The court further ORDERS that BMWE, its divisions, lodges, locals, officers, agents, employees, members, and all persons acting in concert or participation with any of them, provide at least ten days' notice to the affected plaintiff carrier prior to authorizing, encouraging, permitting, calling, or engaging in any strike, work stoppage, picketing, or other

self help against such carrier or its operating rail subsidiaries over any minor dispute or over any major dispute before the dispute resolution procedures prescribed by the RLA have been exhausted.

SIGNED April 12, 2001.

JOHN MCBRYDE

United States District Judge

FINAL JUDGMENT

Consistent with the memorandum opinion and order signed by the court on the date of the signing of this final judgment,

The court ORDERS, ADJUDGES, and DECREES that all claims for declaratory relief by any party be, and are hereby, dismissed.

The court further ORDERS, ADJUDGES, and DECREES that defendant, Brotherhood of Maintenance of Way Employes, its divisions, lodges, locals, officers, agents, employees, members, and all persons acting in concert or participation with any of them, be, and are hereby, restrained and enjoined from authorizing, encouraging, permitting, calling, or engaging in any strike, work stoppage, picketing, or other self-help against plaintiffs, Burlington Northern and Santa Fe Railway Company, Consolidated Rail Corporation, CSX Transportation, Inc., Kansas City Southern Railway Company, Norfolk Southern Railway Company, and Union Pacific Railroad Company, or any of them, or any of their operating rail subsidiaries, over any minor dispute or over any major dispute before the dispute resolution procedures prescribed by the Railway Labor Act have been exhausted without first providing to the affected plaintiff carrier or carriers at least ten days' notice of the action proposed to be taken.

The court further ORDERS, ADJUDGES, and DECREES that plaintiffs have and recover costs of court incurred by them in this action from defendant.

SIGNED April 12, 2001.

JOHN MCBRYDE

United States District Judge

Supreme Court U.S.
FILED
DEC 26 2002
OFFICE OF THE CLERK

No. 02-830

IN THE

Supreme Court of the United States

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,

Petitioner,

v.

THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

RALPH J. MOORE, JR.*
WILLIAM F. SHEEHAN
DONALD J. MUNRO
SHEA & GARDNER
1800 Massachusetts Avenue, NW
Washington, DC 20036
(202) 828-2000

**Counsel of Record*
Counsel for Respondents

December 24, 2002

18 pp

QUESTION PRESENTED

Whether the duty to "exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce" under Section 2 First of the Railway Labor Act ("RLA"), 45 U.S.C. 152 First, may require a union to give advance notice prior to engaging in strikes, when the union has a unique, admitted, long-standing, and on-going practice of engaging in surprise strikes, notwithstanding the fact that such strikes have repeatedly and invariably been deemed illegal under the RLA.

LIST OF PARTIES AND RULE 29 LIST

The parties to this proceeding are the petitioner Brotherhood of Maintenance of Way Employes and the following respondents (with parent companies and nonwholly owned subsidiaries):

1. The Burlington Northern and Santa Fe Railway Company

   Burlington Northern Santa Fe Corporation

2. Consolidated Rail Corporation

   Conrail, Inc.

   CSX Corporation

   Norfolk Southern Corporation

3. CSX Transportation, Inc.

   CSX Corporation

4. Kansas City Southern Railway Company

   Kansas City Southern Industries, Inc.

5. Norfolk Southern Railway Company

   Norfolk Southern Corporation

6. Union Pacific Railroad Company

   Union Pacific Corporation

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IN THE

Supreme Court of the United States

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,

Petitioner,

v.

THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, CONSOLIDATED RAIL CORPORATION, CSX TRANSPORTATION, INC., KANSAS CITY SOUTHERN RAILWAY COMPANY, NORFOLK SOUTHERN RAILWAY COMPANY, AND UNION PACIFIC RAILROAD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

STATUTE INVOLVED

This case primarily concerns Section 2 First of the Railway Labor Act, 45 U.S.C. § 152 First, which is quoted at page 2 of the Petition and attached hereto in Appendix A. This case also implicates Section 3 of the Railway Labor Act, 45 U.S.C. § 153, which is also reproduced in Appendix A.

STATEMENT OF THE CASE

Section 2 First of the Railway Labor Act ("RLA") requires carriers and their employees to "exert every reasonable effort" to "settle all disputes . . . in order to avoid any interruption to commerce." 45 U.S.C. § 152 First. Federal courts may enforce Section 2 First "by whatever appropriate means might be developed on a case-by-case basis," including injunctions that limit strikes by organized labor. *Chicago & North Western Ry.* v. *UTU*, 402 U.S. 570, 577 (1971).

Notwithstanding the obligation to try to resolve labor disputes without strikes, the BMWE – alone among the thirteen major railroad unions – has repeatedly disrupted operations on the nation's freight railroads with secretly planned strikes over the last decade, causing widespread and irreparable injury to the railroads, their customers, and the public. Federal courts have issued no less than eighteen injunctions against illegal strikes by Petitioner since 1993, including four between January 2000 and March 2001. But because Petitioner's practice is to strike without warning, the railroads and the public have been exposed to these disruptions until a court could enter an emergency restraining order.

Faced with this continuing threat of disruptions and lacking any other remedy, the nation's largest freight railroads sought an injunction in the United States District Court for the Northern District of Texas requiring Petitioner to give advance notice before it engages in strikes. Advance notice of planned strikes is, the railroads argued, a "reasonable effort" required by Section 2 First of the RLA, especially when the striking union has been so demonstrably and consistently wrong in the past about the legality of its behavior.

Upon a review of both the history of injunctions against Petitioner and various express admissions by Petitioner's officers, the District Court found that this union has

an ongoing practice of engaging in illegal strikes without warning. The District Court held that, in these circumstances, an injunction requiring ten days advance notice of strikes is an appropriate and effective means of enforcing Section 2 First. *Burlington Northern & Santa Fe Ry.* v. *BMWE*, 143 F. Supp. 2d 672, 694-95 (N.D. Tex. 2001).

The Fifth Circuit affirmed. It agreed that Petitioner had violated Section 2 First by engaging in a "deliberate policy of repeatedly calling surprise strikes," all of which were deemed unlawful. Pet. App. B at 6a.

The Court of Appeals rejected Petitioner's argument that Section 2 First has no application to surprise strikes. It noted that Section 2 First imposes a "comprehensive[]" duty to "'exert *every* reasonable effort . . . to settle *all* disputes . . . in order to avoid *any* interruption to commerce or to the operation of any carrier.'" *Id.* at 5a-6a (quoting 45 U.S.C. § 152 First). The Court concluded that Petitioner's policy of surprise strikes violates that obligation because striking by surprise makes it "difficult or impossible to resolve the underlying dispute between labor and management without 'interruption to commerce.' Because management is unaware that a strike is impending, it cannot take steps that might prevent it." *Id.* at 6a (citation omitted).

The Court of Appeals expressly noted that it was not deciding whether Section 2 First prohibits *all* surprise strikes. Rather, the Court limited its holding to the unique set of facts posed by this case – a union with a well-established practice and policy of engaging in systematic surprise strikes and a determination to continue this practice notwithstanding the fact that the union is invariably wrong in its belief that the strike is legally justified. *Id.* at 8a-9a, 11a.

In dissent, Judge Duplantier maintained that Section 2 First does not clearly provide a basis for a notice injunction,

even in the face of the kind of egregious illegal behavior exhibited by Petitioner. *Id.* at 17a-18a. He did not agree that the broad language of Section 2 First leaves it to courts to develop and apply the duty of "reasonable efforts" on a case-by-case basis.

The Court of Appeals subsequently denied the Petitioner's suggestion for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

The decision below does not raise any important issue of federal law that has not already been settled by this Court, nor does it conflict with any decision of this Court (or any decision of the courts of appeals). Rather, it turns on the application of well-established principles to particular and unusual facts. Indeed, this case presents the unique circumstance posed by a union that insists on striking by surprise, notwithstanding a track record of being consistently wrong about the legality of its actions. Accordingly, the petition for certiorari should be denied.

I. THE PANEL'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT REGARDING SECTION 2 FIRST OF THE RAILWAY LABOR ACT

Petitioner's principal argument is that various decisions of this Court establish a narrow interpretation of Section 2 First and prescribe a very limited role for courts under the RLA. Pet. at 8-15. In other words, Petitioner argues that there is no judicial remedy under the RLA for a pattern of surprise strikes, even if such strikes are always subsequently enjoined as unlawful.

Petitioner cannot establish and indeed does not contend for the existence of an actual conflict between the

decision below and decisions of this Court. Instead, it contends only that the panel's decision is inconsistent with the direction and tone of this Court's decisions construing Section 2 First. As we now show, however, the Court's precedents plainly support the ruling below that Section 2 First is an enforceable obligation that may serve as the basis for an injunction requiring advance notice of strikes in appropriate circumstances.

A. *Chicago & North Western*

The seminal decision regarding the scope and proper interpretation of Section 2 First is *Chicago & North Western Railway* v. *UTU*, 402 U.S. 570 (1971). There, as here, the union argued that Section 2 First did not impose any legal obligations, but rather was a "mere exhortation." *Id.* at 574. This Court disagreed, holding that

> "[Section] 2 First was intended to be more than a mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis." *Id.* at 577.

The Court went on to rule that courts may use injunctions to enforce Section 2 First when it is appropriate, practical, and effective to do so. *Id.* at 577, 582. It remanded to allow the district court to decide whether to issue a strike injunction. *Id.* at 584.

Nevertheless, Petitioner argues that *Chicago & North Western* "described a limited reading of Section 2 First . . . and the scope of judicial action permitted." Pet. at 11. The union points to language in that decision discussing the need for "circumspect[ion]" in enforcing Section 2 First because of the risk of "freewheeling judicial interference in labor relations." *Id.* at 12, quoting *Chicago & North Western*, 402 U.S. at 583. It concludes that Section 2 First should be enforceable only in

situations where one side or the other is refusing to bargain in good faith.

But *Chicago & North Western* clearly held that courts have the flexibility to enforce Section 2 First as appropriate on a case-by-case basis. Nothing in that decision limited the Section 2 First duty of "reasonable efforts" to a duty to bargain in good faith. Moreover, the warning against "judicial interference in labor relations" when enforcing Section 2 First has no application here. *Id.* at 583. This Court was speaking of the risk that judges – if asked to review the parties' conduct in bargaining – might impose their own views about what the terms of a collective bargaining agreement should be. *Id.* at 579 n.11. This is obviously not a case where the enforcement of Section 2 First invites any such meddling in the substantive terms of agreements or judicial second-guessing of bargaining positions.

B. *Burlington Northern*

Petitioner's reliance on the decision in *Burlington Northern Railroad* v. *BMWE*, 481 U.S. 429 (1987) is likewise misplaced. That case held that Section 2 First does not bar secondary picketing by a union that has fully exhausted the RLA's "major dispute" procedures. Petitioner extrapolates from this proposition that courts may *never* infer limitations on strikes from the language of Section 2 First because Section 2 First is not a "basic command" of the RLA. Pet. at 10, 13.

The critical fact in *Burlington Northern*, however, was that the union engaged in secondary picketing had exhausted the major dispute procedures of the RLA. This Court reasoned that Section 2 First does not limit secondary picketing after exhaustion of these procedures because "the availability of such self-help measures as secondary picketing may increase the effectiveness of the RLA in settling major disputes by creating

an incentive for the parties to settle prior to exhaustion of the statutory procedures." 481 U.S. at 451-52.

In this case, by contrast, there has been no exhaustion of *any* statutory procedures by Petitioner. Indeed, the notice injunction is necessary precisely because the Petitioner insists on striking instead of using the procedures of the RLA, despite its seeming inability to correctly ascertain the lawfulness of such behavior. Thus, far from constituting a restriction on a union that has fully complied with the dispute resolution procedures of the RLA, the equitable relief in this case simply allows those procedures to operate as intended.[1]

Moreover, even if one ignores this crucial difference between *Burlington Northern* and this case, the holding in *Burlington Northern* that secondary picketing is sometimes permissible says nothing about whether the RLA may, in appropriate circumstances, require advance notice of strikes. It is entirely consistent to say that giving prior notice of strikes under the facts of this case is a "reasonable effort," but refraining from all secondary picketing is not.

C. Decisions Prior to Chicago & North Western

Finally, Petitioner cites a series of decisions that contain language supposedly prescribing a limited role for courts under the RLA. Pet. at 10, 14-15. But most of those

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[1] Because it aids and preserves the mandatory arbitral process established by Section 3 of the RLA, the notice injunction issued in this case clearly serves to uphold the "basic commands" of the RLA, even beyond the fundamental duty to "exert every reasonable effort" found in Section 2 First. The bargain of the RLA was that unions would give up the right to strike in exchange for guaranteed, binding arbitration under Section 3. As this Court recognized in *BRT* v. *Chicago River & Indiana Railroad.*, 353 U.S. 30 (1957), that bargain is negated if the union is free to strike first, arbitrate later.

decisions predated *Chicago & North Western*, which could not have been clearer that courts may enforce Section 2 First by injunction when it is "practical" and "appropriate" to do so. 402 U.S. at 577, 582. Indeed, *Chicago & North Western* expressly disavowed the passage in the *General Committee of Adjustment* decision[2] on which Petitioner relies, *id.* at 577-78, and pointed out that the *Virginian Railway* decision[3] actually affirmed an injunction requiring compliance with the strict terms of Section 2 First. *Id.* at 579. And the decision in *Trans World Airlines* v. *Independent Federation of Flight Attendants*, the only cited case decided after *Chicago & North Western*, involved the treatment of replacement workers after the end of a strike, did not address Section 2 First, and said nothing to suggest that the principles established in *Chicago & North Western* have been changed in any way. 489 U.S. 426, 439-443 (1989).

In sum, it is worth emphasizing that no judge who has examined this case – not the district court, not the panel majority, not even the dissenting member of the panel – thought that Petitioner's arguments based on this Court's precedent were even worthy of mention. Thus, review is not warranted here to assure consistency with this Court's prior rulings.

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[2] *General Committee of Adjustment* v. *Missouri-Kansas-Texas R.R* 320 U.S. 323 (1943).

[3] *Virginian Ry.* v. *System Federation*, 300 U.S. 515 (1937).

II. THE PANEL'S DECISION DOES NOT "AMEND" THE RAILWAY LABOR ACT

Petitioner contends that the panel "effectively amend[ed] the RLA by judicial fiat" when it found that Section 2 First may incorporate a duty of advance notice in some circumstances. Pet. at 15. According to Petitioner, because Section 2 First does not contain an express duty of advance notice, the panel must have written it into the statute. *Id.* at 16-17.

But what Petitioner calls judicial "re-writing" is really just an application of Section 2 First that it does not like. Petitioner admits that the panel based its decision on the plain text of the statute, not some figment of judicial imagination. *Id.* at 4. In particular, the panel relied upon the statutory reference to "every *reasonable effort* . . . to settle all disputes . . . to avoid any interruption to commerce." 45 U.S.C. § 152 First (emphasis added).

As noted above, this Court has held that defining a "reasonable effort" is a "case-by-case" inquiry. *Chicago & North Western*, 402 U.S. at 577. The RLA's legislative history likewise reveals that everyone understood that the duty of "reasonable efforts" would be enforced by the courts "as necessities arise." Hearings on H.R. 7180 Before the House Comm. on Interstate and Foreign Commerce, 69th Cong., 1st Sess. 91 (1926). Thus, what constitutes a "reasonable effort" depends on the facts.

In applying the duty of Section 2 First to the facts of this case, the panel was clearly justified in concluding that advance notice may be a "reasonable effort" when a union has repeatedly engaged in surprise strikes – in derogation of the procedures mandated by the RLA – and has been repeatedly enjoined from doing so. The fact that no other court has issued such an injunction is simply because no other union in the

history of the RLA has ever before pursued such a dedicated practice of surprise strikes, without regard to legality or harm to others. The panel correctly concluded that – at least in these special circumstances – giving advance notice before engaging in more strikes is part of Petitioner's duty to make "every reasonable effort." That is not judicial amendment of the RLA; it is a reasoned application of settled law to the unusual facts of this case.

III. THE PANEL'S DECISION TURNS ON THE FACTS AND DOES NOT PRESENT ANY IMPORTANT ISSUE OF FEDERAL LAW

Petitioner argues that the decision of the panel "made a radical change in the rights and obligations of labor and management" under the RLA. Pet. at 6. In particular, Petitioner complains that the panel has vastly expanded the scope of disputes that are subject to Section 2 First, thereby requiring federal courts to police labor relations in the rail and airline industries. *Id.* at 19-21.

The panel's decision bears no such extravagant construction. The scope of Section 2 First has long been well-settled. The only real question before the panel was whether this particular injunction was a "practical" and "appropriate" means of addressing this particular pattern of illegal behavior by this particular union. *Chicago & North Western*, 402 U.S. at 577, 582.

Again, the answer to that question was driven by the facts, *i.e.*, an idiosyncratic history of serial, unlawful strikes by a union that follows a policy of "strike first, negotiate later." The remedy of ten days advance notice was specially designed to address this unique problem. Thus, the decision does not have any sweeping ramifications for American labor law or for labor relations in the rail or airline industries.

Indeed, the panel itself was careful to note the limits of its decision. After finding that Petitioner's practices violate Section 2 First, the majority stated that

> "[w]e need not, however, go as far as the District of Columbia Circuit did in concluding that *any* 'deliberate timing of a strike without prior warning' violates the statute. For purposes of the present case, we decide only that the statute forbids an ongoing, repeated practice of surprise strikes that are doomed later to be held illegal and enjoined. We need not and do not address the question whether the RLA forbids *all* surprise strikes. Nor do we need to reach the Eleventh Circuit's holding that anti-strike injunctions are appropriate any time a union's violation of a 'clear statutory provision' threatens 'interruption to commerce.'" Pet App. B at 8a-9a (citations omitted).

Similarly, there is no legitimacy to the Petitioner's dire warnings that if Section 2 First is applied outside the context of good faith bargaining, courts will be inundated with "challenges to a whole host of tactics and actions that have not previously been regulated by the RLA." Pet. at 21. The Court of Appeals made short shrift of this argument, noting that other situations wherein a union or carrier might invoke the duty of "reasonable efforts" are "readily distinguishable." Pet. App. B. at 9a. This is because

> "[Section 2 First] applies only to actions that cause 'interruption to commerce or to the operation of any carrier . . . .' The actions posited by BMWE, while they may make dispute resolution more difficult, do not, in and of themselves, interrupt commerce, while surprise strikes undeniably do. And strike prevention, not dispute resolution per se, was 'the major purpose of

Congress in passing the Railway Labor Act.' *Texas & New Orleans*, 281 U.S. at 565." *Id.*

* * * *

The decision below is in harmony with the principles uniformly applied concerning Section 2 First of the RLA. The panel expressly limited its holding to the facts: a decade-long pattern of illegal surprise strikes by a union that insists on continuing its disruptive behavior in the future. The notice injunction is a special remedy for a special case, driven by circumstances never seen before and unlikely to be seen again in the rail industry. It does not merit review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RALPH J. MOORE, JR.*
WILLIAM F. SHEEHAN
DONALD J. MUNRO
SHEA & GARDNER
1800 Massachusetts Avenue, NW
Washington, DC 20036
(202) 828-2000

**Counsel of Record*
Counsel for Respondents

December 24, 2002

APPENDIX A

STATUTES INVOLVED

Section 2 First of the Railway Labor Act, 45 U.S.C. § 152 First, provides as follows:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 3 First (i) of the Railway Labor Act, 45 U.S.C. § 153 First (i) provides as follows:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

(3)

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IN THE

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
Petitioner,

v.

BURLINGTON NORTHERN and
SANTA FE RAILWAY COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

PETITIONER'S REPLY BRIEF

Of Counsel:

WILLIAM A. BON
General Counsel
BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES
26555 Evergreen Road, Suite 200
Southfield, MI 48076
(248) 948-1010

SANFORD R. DENISON
BAAB & DENISON, L.L.P.
2777 N. Stemmons Freeway
Suite 1100
Dallas, TX 75207-2228
(214) 637-0750

RICHARD S. EDELMAN *
O'DONNELL, SCHWARTZ,
ANDERSON, P.C.
1900 L Street, N.W.
Suite 707
Washington, D.C. 20036
(202) 898-1824

* Counsel of Record

January 13, 2003

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On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

PETITIONER'S REPLY BRIEF

This brief is submitted by petitioner Brotherhood of Maintenance of Way Employes ("BMWE") in reply to respondents' ("Carriers") brief in opposition to BMWE's petition for a writ of certiorari for review of the decision of the United States Court of Appeals for the Fifth Circuit in *Burlington Northern and Santa Fe Railway Company, et al. v. Brotherhood of Maintenance of Way Employes*, 286 F. 3d 803(5th Cir. 2002)

I. RESPONDENTS HAVE NOT REFUTED BMWE'S SHOWING THAT THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH PRECEDENT OF THIS COURT REGARDING THE SCOPE OF SECTION 2 FIRST

The Carriers have argued that the Fifth Circuit's decision does not conflict with decisions of this Court, and that the Fifth Circuit did not effectively amend the RLA by judicial

fiat. Opposition at 4-10. However, BMWE demonstrated that there is a direct conflict between the decision below and the Court's decisions in *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employes*, 481 U.S. 429 (1987) ("*BN v. BMWE*") and *Chicago & North Western Transp. Co. v. United Transportation Union*, 402 U.S. 570 (1971) ("*CNW v. UTU*"). The Carriers' attempts to deny the conflict are unavailing. The courts below apparently viewed BMWE's actions as contrary to the spirit of the RLA because they found that BMWE had engaged in a number of strikes in violation of RLA Section 3, 45 U.S.C. §153. But this Court has consistently rejected efforts to use Section 2 First as a catch-all regulator of conduct of carriers and unions that is not regulated in other sections of the statute.

The Carriers assert that *BN v. BMWE* is distinguishable on its facts because there the union had engaged in secondary picketing, and the parties had exhausted RLA dispute resolution processes. Opposition at 6. But, by selectively focusing on the specific facts of that case, the carriers have ignored the Court's holding regarding the scope of Section 2 First and the explanation of its reasoning. The Court's rejection of the carriers' Section 2 First claim in that case was not because of the nature of the union's conduct, or the parties' completion of bargaining. Rather, the Court considered and expressly rejected the carriers' expansive interpretation of Section 2 First based on its "general language" regarding the duty "to attempt to settle disputes", and its stated goal of avoiding "interruptions of interstate commerce". 481 U.S. at 450, citations omitted. In doing so, the Court reviewed the language of Section 2 First and prior decisions regarding that provision, as well as precedent regarding the ability of courts to enforce the RLA generally, and Section 2 First in particular. In describing the limited scope of Section 2 First, the Court in *BN v. BMWE* cited both *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.* 353 U.S. 30 (1957) ("*Chicago River*") and *Chicago & North Western*

Transp. Co. v. United Transportation Union, 402 U.S. 570 (1971) ("*CNW v. UTU*"). It explained that a party has a cause of action under the RLA only when there is "express language" creating an "explicit obligation" involving a "'basic command' of the RLA". 481 U.S. at 451 n. 15. The Court held that there is no cause of action when it is asked not only to infer that a statutory duty may be enforced, "but also that such a duty exists". *Id.* The Court then concluded that "[t]he language of §2 First does not contain, however, either an express prohibition of secondary activity or suggestion that the scope of self -help is limited". *Id.*

While the instant case did not involve secondary activity after dispute resolution processes are exhausted, the Fifth Circuit's decision is squarely at odds with this Court's interpretation of Section 2 First and holding in *BN v. BMWE* which prescribed a limited scope of Section 2 First and a limited role for the courts with respect to that provision. Just as Section 2 First contains no express prohibition against secondary activity or an express limitation on the use of self help after bargaining is completed, Section 2 First contains no express prohibition against strikes without advance notice. As in *BN v. BMWE*, in this case, the Carriers again asked the courts to do more than find that an actual duty may be enforced; and the courts below did not just enforce an express command, they also inferred that a duty exists. While *BN v. BMWE* may be distinguishable from this case on its facts, the legal basis for the decision below clearly relies on the same expansive interpretation of Section 2 First based on its general language and goal that was conclusively rejected by this Court in *BN v. BMWE*. Accordingly, there is indeed a conflict between the two decisions.

The Carriers also argue that the decision below is actually consistent with this Court's decision in *CNW v. UTU*. Opposition at 5-6. BMWE respectfully submits that the Carriers have read the *CNW v. UTU* decision in a manner that is at odds with the Court's actual holding.

CNW v. UTU was a carefully balanced and limited 5-4 decision. The Court held only that Section 2 First is not merely hortatory (*id.* at 576), and that bad faith bargaining is so contrary to the express mandate of Section 2 First that parties exert every reasonable effort to make and maintain agreements and settle disputes, that bad faith bargaining would give rise to an action under that provision. *Id.* at 579.[1] But, after that reaching that conclusion, the Court specifically expressed its concern that judicial enforcement of Section 2 First might distort the bargaining process and reduce incentives to compromise, and that "the vagueness of the obligation under Section 2 First could provide cover for a freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place". *Id.* at 583. The Court then stated that "[t]hese weighty considerations indeed counsel restraint in the issuance of strike injunctions based on violations of Section 2 First". 402 U.S. at 583, citations and footnote omitted. BMWE respectfully submits that the Fifth Circuit's expansive reading of Section 2 First is not supported by *CNW v. UTU*; rather it is actually at odds with the Court's limited reading of that provision and its caution that judicial restraint is required in interpretation and application of Section 2 First.

In support of the Fifth Circuit's expansion of the duty imposed by Section 2 First, the Carriers rely heavily on the Court's remark in *CNW v. UTU* that the duty was "enforceable by whatever means appropriate on a case-by-case basis". Opposition at 5-6, *citing CNW v. UTU*, 402 U.S. at 577. But, the Carriers ignore the context of that statement and further ignore the express limitations on the Court's holding at the

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[1] *See also id.* at 574—"the narrow questions presented to us are whether §2 First imposes a legal obligation on carriers and employees or is a mere exhortation; whether the obligation is enforceable by the judiciary and whether the Norris-LaGuardia Act strips the courts of jurisdiction to enforce the obligation by strike injunction".

end of the decision. The Court made that statement in response to the appellate court's holding that Section 2 First was not enforceable in any circumstance, and after a review of the history of the RLA and prior RLA precedent regarding the limited role of the courts under the Act. *Id.* at 574-577. The Court observed that the carrier and union representatives who negotiated the statute had not listed specific violations and penalties in Section 2 First, but nonetheless intended that its mandate that the parties exert every reasonable effort to make and maintain agreements and settle disputes would be enforceable by the courts, but through case by case adjudication. 402 U.S. at 576, 577. The point of that discussion was to show that Section 2 First is not without effect, and that it does at least create the binding obligation to bargain in good faith which could be enforced.

The *CNW v. UTU* Court did not hold that the Courts have license to fill-in perceived gaps in the RLA by proscribing any conduct they deem to be inconsistent with the goals of the statute. Moreover, any question in this regard was resolved by the subsequent decision in *BN v. BMWE* in which the Court described the limited reach of the holding in *CNW v. UTU*. The *BN v. BMWE* Court noted that although the *CNW v. UTU* decision found that the "express language of Section 2 First creates a duty to 'exert every reasonable effort' to settle disputes", it only inferred that the duty was legally enforceable; whereas, in *BN v. BMWE* no "'basic command' of the RLA" could be said to have been violated; and the Court was being asked to not only infer that a statutory duty was so crucial that it was enforceable by injunction, "*but also that such a duty exists*". *Id.*, emphasis added.

It is therefore clear that when *CNW v. UTU* is read together with *BN v. BMWE*, the precedent of this Court rejects the notion that Section 2 First can be violated when a union does not give advance notice of strikes. As in *BN v. BMWE*, there is no such statutory command in Section 2 First. And, as in *BN v. BMWE*, the general language and statement of purpose

of Section 2 First is not sufficient to create the sort of new prohibition created by the Fifth Circuit; because in this case, like *BN v. BMWE*, one would have to infer not only an ability to enforce a purported duty, but also that a duty exists.

It is also clear that the courts below did effectively amend the RLA by requiring BMWE to give advance notice of strikes in future disputes. The Carriers asserted that BMWE had repeatedly violated RLA Section 3, by striking over disputes that were required to be arbitrated under that provision. Although Section 3 was effective in permitting quick injunctions to end those strikes, the Carriers looked to expand the duty imposed by Section 2 First to provide a basis for an injunction to prevent future strikes in violation of Section 3. The courts granted the injunction because they thought it appropriate to restrain conduct that they viewed as contrary to the spirit of the RLA and the expressed goal of Section 2 First. But this Court has consistently rejected that sort of expansive reading of Section 2 First and activist role for the courts under the RLA.

II. RESPONDENTS HAVE NOT REFUTED BMWE'S SHOWING THAT IF THE DECISION BELOW IS ALLOWED TO STAND, IT WILL HAVE A RADICAL IMPACT ON APPLICATION OF THE RLA

The Carriers contend that the Court should not review the decision below because it concerns only the particular conduct of one union, and because they claim that it does not involve an interpretation of the statute that will have wide-ranging implications. Opposition at 9-12. However, the Fifth Circuit's decision, and the reasoning on which its holding was based, cannot be restricted to this one case and this one union. If the decision is allowed to stand, both carrier and union conduct that has not previously been regulated will become subject to judicial oversight.

The Carrier's have restated the "Question Presented" here as whether Section 2 First may require a union to give advance notice of strikes ". . . when the union has a unique, admitted long-standing, and ongoing practice of engaging in surprise strikes, notwithstanding the fact that such strikes have repeatedly and invariably been deemed illegal under the RLA". As the Carriers have described the issue, the injunction does not depend on a specific and express duty under Section 2 First, but on who BMWE is, and what it has done in past litigated cases, rather than what the parties' legal duties are under Section 2 First as defined by precedent of this Court. The Court of Appeals was also concerned with what BMWE had done in past disputes, as opposed to the actual requirements of Section 2 First. The Fifth Circuit stated that "[w]e need not, and do not address the question whether the RLA forbids *all* surprise strikes"; only that "the statute forbids an ongoing, repeated practice of surprise strikes that are doomed later to be held illegal and enjoined". App. B. at 9a.

The Carriers and the court below have confused the issue of whether there has been a violation of law with the issue of what remedy is appropriate when the law has been repeatedly violated. If there actually was an RLA prohibition against strikes without advance notice, prior conduct would be irrelevant to a finding that there was an unlawful action; although it could be relied on as supporting a prospective advance notice injunction in a particular case. But, while repetition of unlawful behavior may be an appropriate consideration in formulation of a remedy when there is a violation of law, repetition itself does not make behavior unlawful. Either the language of Section 2 First imposes a duty on unions to give advance notice of strikes, or it does not. If two unions strike without notice over the same carrier action, it cannot be that one union's action is unlawful because it has struck without notice before, whereas the same action by the other union is not unlawful because it has not previously struck without

notice. Moreover, the Fifth Circuit's holding that there was a violation of Section 2 First based on behavior that may not be unlawful in isolation, but was unlawful because it was repeated, will certainly have precedential effect on future Section 2 First cases and future cases under other provisions of the RLA.

The broad implications of the Fifth Circuit's decision are illustrated by consideration of an analogous situation involving carrier actions in response to employee organizing efforts. RLA Section 2 Fourth (45 U.S.C. §152 Fourth) prohibits interference with employee self-organization and mutual assistance. The determination of whether a carrier's response to a new organizing effort violates Section 2 Fourth has never depended on whether the carrier has responded in the same manner to prior campaigns. But, under the Fifth Circuit's reasoning, if two carriers respond similarly to employee organizing, one could be found in violation of Section 2 Fourth because of prior similar conduct, whereas the other carrier could be found to have acted within the law because it had not previously engaged in the same conduct. Such a result would be to judicially amend Section 2 Fourth by converting otherwise unregulated conduct into unlawful conduct based on the frequency of its occurrence, just as the Fifth Circuit has done with respect to Section 2 First in this case.

The Carriers' have also failed to refute BMWE's showing that the Fifth Circuit's decision will affect various types of union and carrier actions that have not been held to violate the RLA. Petition at 19-21. The Fifth Circuit derived the advance notice obligation from an expansive application of Section 2 First's language regarding the duty to exert every reasonable effort to make and maintain agreements and settle disputes. The very breadth of the words used in Section 2 First means that, if they are to be read and applied expansively, they will necessarily cover a broad range of union and carrier actions not previously subject to judicial regulation.

The language of Section 2 First requires "every" effort that is "reasonable"; and that effort applies to both the making and maintaining of agreements and to settlement of all disputes. If that language is read and applied expansively, it necessarily would apply to all sorts of conduct that would impede, or even merely fail to advance, the making and maintaining of agreements or settlement of disputes. The general nature of the words used in Section 2 First is the reason why this Court has carefully limited its application.

In *CNW v. UTU*, this Court recognized that the language of Section 2 First was vague and facially very general, and that judicial involvement in disputes under Section 2 First could have a wide-ranging, and unintended adverse impact on rail and airline industry labor relations. *See* 402 U.S. at 583, noting that judicial enforcement of Section 2 First might distort dealings between carriers and their employees; and counseling restraint in the issuance of injunctions based on violations of Section 2 First because "the vagueness of the obligation under Section 2 First could provide cover for a freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place". For similar reasons, in *BN v. BMWE* the Court refused to infer an enforceable obligation from the "general language" of Section 2 First. 481 U.S. at 450. As the Court noted in *BN v. BMWE* (*id.* at 451 n. 15), it was appropriate in *Chicago River* (362 U.S. at 338-339) to infer an enforceable duty not to strike over minor disputes from the express and unambiguous command of RLA Section 3 that such disputes must be arbitrated; but it was not appropriate to infer a prohibition against secondary picketing from the general language of Section 2 First that was neither express nor unambiguous with regard to such conduct. The same consequences of an expansive reading and application of the language of Section 2 First that concerned the Court in *CNW v. UTU*, and that led to rejection of the carriers' argument in *BN v. BMWE* are pertinent here.

Thus, it is clear that because of the general language of Section 2 First on which the Fifth Circuit has relied, the precedential effect of its decision cannot logically be limited to just this union and just this case. While the Carriers argue that the Fifth Circuit's holding will have limited application, expansion of Section 2 First beyond the duty to bargain in good faith will certainly mean that the provision will be applied to other situations. There simply is no principled way to confine the reasoning of the decision below so that it will not effect the sorts of cases that are described in BMWE's petition at 19-21; and that necessitates this Court's review of the Fifth Circuit's decision.

CONCLUSION

The Court should grant the writ sought by BMWE, and review and reverse the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Of Counsel:

WILLIAM A. BON
General Counsel
BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYES
26555 Evergreen Road, Suite 200
Southfield, MI 48076
(248) 948-1010

SANFORD R. DENISON
BAAB & DENISON, L.L.P.
2777 N. Stemmons Freeway
Suite 1100
Dallas, TX 75207-2228
(214) 637-0750

RICHARD S. EDELMAN *
O'DONNELL, SCHWARTZ,
ANDERSON, P.C.
1900 L Street, N.W.
Suite 707
Washington, D.C. 20036
(202) 898-1824

* Counsel of Record

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